AGRICULTURE DECISIONS

Volume 48

July - December 1989
Part Three (PACA)
Pages 1079-1146

UNITED STATES DEPARTMENT OF AGRICULTURE

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

PREFATORY NOTE

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in AGRICULTURE DECISIONS.

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

UNITED STATES OF AMERICA, Plaintiff, v. PRODUCE HAWAII, INC., Defendant.
Civ. No. 88-00396.
Decided August 2, 1989.

"Interstate commerce" - Operating without a license.

Daniel Bent, U.S. Attorney and Florence T Nakakuni, Assistant U.S. Attorney, Honolulu, Hawaii, for Plaintiff.
Stuart Josefsberg, Braude and Margulies, Honolulu, Hawaii, for Defendant.
David A Ezra, District Judge.

UNITED STATES DISTRICT COURT, D. HAWAII

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTION

I. BACKGROUND

The United States (plaintiff) brought this action against Produce Hawaii, Inc. (defendant) to collect civil penalties and for injunctive relief pursuant to 7 U.S.C. § 499a *et seq.*, the Perishable Agricultural Commodities Act ("PACA"). In the instant motion plaintiff seeks an order granting it summary judgment pursuant to Fed.R.Civ.P. 56(c) on all issues in the complaint.

Defendant began its operations purchasing fruits and vegetables for resale in April 1985.[1] All of defendant's business activities are carried on within and among the islands comprising the State of Hawaii.

In May 1985, defendant applied for a license from the U.S. Department of Agriculture under the PACA which would have allowed it to conduct business in interstate or foreign commerce. Because defendant's predecessor company had been discharged in bankruptcy, the U.S. Department of Agriculture required that the defendant post a $400,000 bond as a condition of the granting of that license. However, defendant's financial condition prohibited it from obtaining the required bond and on December 29, 1985, defendant's application form was returned, with no permit having been issued.

Throughout the period of time its PACA application was being considered by the U.S. Department of Agriculture, defendant shipped perishable

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[1]The predecessor to Produce Hawaii, Inc. filed bankruptcy in 1982. Its parent company, Armstrong Produce, Ltd., filed a plan of reorganization in 1984 which was approved by the bankruptcy court. Armstrong Produce, Ltd. owns 100% of the stock of defendant. Motion for Summary Judgment, Exhibit 1 p. 4.

commodities between the islands pursuant to State of Hawaii permits and maintains it was unaware that a license pursuant to the PACA was necessary to engage in that same inter-island activity.

However, defendant does not now dispute that in operating without a valid PACA license, it was in *technical* violation of that statue. Instead, defendant contends its operations did not constitute an *actionable* "violation" of the PACA because its conduct was neither willful or in bad faith. Further, defendant asserts that the federal government had no intent to regulate shipments of perishable items covered by the PACA between the several islands comprising the State of Hawaii and therefore its operation could not have been an actionable violation of the Act.

II. APPLICATION LEGAL STANDARDS.

A. Summary Judgment

Fed.R.Civ.P 56(c) provides for summary judgment when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact." *T. W. Electrical Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th cir. 1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

If the moving party meets this burden, then the opposing party may not defeat a motion for summary judgment absent any significant probative evidence tending to support his claim. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the moving party's evidence at trial. *See T. W. Elec., supra.*

When the "evidence" produced by each side conflicts, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." Inferences from the facts must be drawn in the light most favorable to the opposing party and may be drawn both from underlying facts that are not in dispute as well as from disputed facts. *T. W. Elec.,* 809 F.2d at 631.

B. Injunctive Relief

[1] To obtain injunctive relief, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable

harm increases as the probability of success on the merits decreases. Under either formulation, the moving party must demonstrate a significant threat of irreparable injury, irrespective of the magnitude of the injury. *Big Country Foods v. Bd. of Ed. of Anchorage S.D.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (citations omitted).

III. DECISION OF THE COURT

[2] Any "merchant, broker or dealer," as defined in 7 U.S.C. § 499a (PACA), who engages in the business of buying or selling at wholesale any perishable agricultural commodity "in interstate or foreign commerce" must first obtain a license from the U.S. Department of Agriculture. "Interstate or foreign commerce" includes commerce "between points with the same State . . . but through any place outside thereof." 7 U.S.C. § 499a(3).

A violator of these statutory provisions is subject to a civil penalty of $500.00 plus $25.00 per day for each day it is in violation. (7 U.S.C. § 499c(a).) In addition, that violator is subject to an order of the court restraining it from continuing such operations without appropriate licenses if such order is deemed necessary. (7 U.S.C. § 499h(d).)

Even though defendant now admits its business was "in interstate or foreign commerce" as defined by 7 U.S.C. § 499a(3),[2] it contends "there is no dominant or controlling Federal purpose or interest requiring application of the PACA to Defendant's activities, which were performed between the islands of Hawaii." Defendant's Memorandum in Opposition to Motion for Summary Judgment, p. 4 ¶ 9.

In short, it is defendant's position that Congress did not intend that the licensing or sanctioning provisions of the PACA were to be applied to the sale or transportation of produce within or between the islands of Hawaii, even though, admittedly, these islands are separated by channels defined as the "open seas." The defendant maintains this happenstance cannot convert otherwise ostensibly intrastate trade into interstate or international commerce. Defendant's Memorandum, p. 5, ¶ 10.

The PACA was enacted in 1930 "for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruits and vegetables." *George Steinberg and Son, Inc., v. Butz*, 491 F.2d 988, 990 (2d Cir. 1974), *cert denied*, 419 U.S. 830, 95 S.Ct. 53, 42 L.Ed.2d 55 (1974). *See* also 1962 U.S.Code Cong. & Admin.News 2749.

Considering the unambiguous language of 7 U.S.C. § 499a(3), it is clear that Congress has expressed an intent in regulating the shipment of perishable agricultural commodities "between points within the same State . . . but through any place outside thereof." Inter-island transportation of perishable

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[2] *See also Island Airlines, Inc., v. C.A B.*, 352 F.2d 735 (9th Cir. 1965) (held that the airspace outside the 3-mile limit of each island of Hawaii was within the jurisdiction of the C.A.B. even though the flights of the airline company were solely between the islands of Hawaii. The Ninth Circuit found that airspace to be "interstate" because the waters over which it was suspended was "interstate". 352 F.2d at 742.)

commodities through or over navigable waterways of the United States constitutes "interstate commerce," as contemplated by this statutory scheme. *Island Airlines, Inc., supra*. Therefore, defendant's argument lacks merit.

Lastly, defendant argues that the individuals responsible for the conduct of defendant's operations would have had to have been either clairvoyant or prescient to conclude that the sale and/or shipment of produce between the islands of Hawaii would, as alleged, violate Federal law and would subject Defendant to the fines and penalties enumerated in the Act." Defendant's Memorandum, p. 6, ¶ 13.

However, the defendant has also acknowledged that its claimed "ignorance of the law" does not exempt it from the PACA requirements. This court finds it unreasonable to conclude that defendant would embark upon a substantial commercial venture without researching the legal requirements of that business. Further, the record indicates that defendant did in fact employ an attorney to assist it in its aborted PACA license application process.[3]

Defendant has made no showing that it is exempt from the requirements of the PACA, that it did not violate those requirements, or that there is any basis which would otherwise exempt it from liability for those violations. Therefore, plaintiff's motion for summary judgment against defendant and for civil penalties is GRANTED. *Commodity Futures, supra; T. W. Elec., supra.*

[3] While the plaintiff has requested an assessment of $5,050.00 in civil penalties, it has recognized that this court may, within its discretion, impose a lesser assessment if the circumstances warrant. Plaintiff's Reply Memorandum, pp. 7-8. Defendant is hereby assessed civil penalties in the sum of $1,000.00 for its violations. Under all the circumstances, this court finds that a larger amount is not justified or warranted where plaintiff did not show defendant's violations to be the result of affirmative or blatantly willful misconduct.[4]

This court also finds that plaintiff has met the test mandated for injunctive relief as outlined in *Big Country Foods, supra*. Therefore, a preliminary and permanent injunction is hereby GRANTED in favor of plaintiff and against defendant permanently restraining defendant from conducting or participating in the conduct of any business activity in violation of the PACA to include but not limited to participation in the commercial shipment of produce or other commodities covered by the Perishable Agricultural Commodities Act without a U.S. Department of Agriculture license as required by that Act.

IT IS SO ORDERED.

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[3]The following statement is found in a letter dated December 6, 1985, from defendant's insurance agent to the U.S. Department of Agriculture: "Upon acceptance [of defendant's proposal to provide Armstrong as indemnitor rather than a bond], Mr. Teruya will gladly have his legal counsel prepare the necessary documents binding Armstrong Produce, Ltd. as indemnitor." Motion for Summary Judgment, Exhibit 12, p. 2.

[4]This Court may, in its discretion, reduce the amount prayed for. *United States v. William B. Mandell Co.*, 242 F. Supp. 873 (E.D.Pa. 1965).

PERISHABLE AGRICULTURAL COMMODITIES ACT

DISCIPLINARY DECISIONS

In re: VALENCIA TRADING CO., INC.
PACA Docket No. D-88-535.
Decision and Order filed October 26, 1989.

Failure to pay promptly - Responsibly connected persons - Failure to allow complete access to records.

The Judicial Officer affirmed the order by Chief Judge Palmer (ALJ) finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act by failing to make full payment promptly for 72 lots of produce from March through May 1988, totalling $308,936 40, and upholding the Department's refusal to issue a license to respondent under the Act because of the payment violations, and because Mr. Myers, who is the sole stockholder and officer of respondent, operated without a valid license and refused to allow the Department's employees full access to respondent's records. Oral agreements for deferred payment are ineffective to change the requirements for prompt payment. Complainant's proof surpasses the preponderance of the evidence, which is all that is required. The ALJ properly received newly discovered evidence offered by complainant. If a respondent does not have a license in effect when a disciplinary order is issued, the ALJs and the Judicial Officer have no authority to issue a "license," and then suspend that "license" for a slow-pay violation. If the ALJ and Judicial Officer find that such a person has committed flagrant or repeated violations of the Act, the effects of such a finding on responsibly connected persons are mandated by the Act, and cannot be changed by the ALJs and the Judicial Officer.

Edward M. Silverstein, for Complainant.
Stephen P. McCarron, for Respondent, at the hearing and Lloyd C. Myers, Pro se on appeal, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Chie Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decisio and Order on June 7, 1989, finding that respondent has committed repeate and flagrant violations of the Act by failing to make full payment promptly fo 72 lots of produce from March through May 1988, totalling $308,936.40. Th ALJ also upheld the Department's refusal to issue a license to responden under the Act because of the payment violations, and because Mr. Myers, wh is the sole stockholder and officer of respondent, operated without a vali license and refused to allow the Department's employees full access t respondent's records.

On September 15, 1989, respondent appealed to the Judicial Officer, t whom final administrative authority to decide the Department's cases subject

[1]*See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On October 16, 1989, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose. For the same reasons, respondent's request to file a further brief is denied.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted (with a few trivial changes) as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a proceeding to discipline respondent, Valencia Trading Co., Inc. (Valencia), and deny it a dealer's license under the Perishable Agricultural Commodities Act of 1930, as amended, (7 U.S.C. § 499a *et seq.*) (PACA). The proceeding was instituted by a Notice to Show Cause and Complaint, filed on June 30, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged: a) Valencia violated Section 2 of the PACA (7 U.S.C. § 499b) by failing to make full and prompt payment of the agreed purchase price for 72 lots of lettuce, which totaled $308,936.40; b) Valencia violated Sections 3 and 8 of the PACA (7 U.S.C. §§ 499c and 499h) during the period December 15, 1987, through June 10, 1987, by engaging in business as a dealer in fresh and frozen fruits and vegetables, in interstate and foreign commerce, without holding a valid and effective license; and c) Valencia violated Sections 3, 4, 6, 8, 9, and 13 of the PACA (7 U.S.C. §§ 499c, 499d, 499f, 499h, 499i, and 499m) by failing to give employees of the Secretary of Agriculture full and complete access to books and records related to its operations as a dealer.

The respondent filed an Answer on July 12, 1988, in which it denied violating the PACA.

An oral hearing was held before me on October 13 and 14, 1988, in Los Angeles, CA. The Complainant was represented by Edward M. Silverstein, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. The respondent was represented by Stephen P. McCarron, Sures, Dondero & McCarron, 8720 Georgia Ave., Silver Spring, MD 20910.

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

On November 30, 1988, the Complainant moved to reopen the hearing to permit the submission of evidence which was not in existence at the time of the hearing. Given the relevance of the proffered evidence to the issues in this matter, the motion was granted and the evidence was received. The respondent was directed to submit evidence in rebuttal or, in the alternative, to show cause why the oral hearing should be reconvened.

Respondent duly submitted rebuttal evidence. Complainant then moved that the oral hearing be reconvened to permit the presentation of evidence on issues not addressed by respondent's rebuttal evidence. The motion was denied, and the record closed, on April 12, 1989.

All proposed findings of fact, conclusions of law and arguments submitted by the parties have been considered. To the extent indicated, they have been adopted. All other findings of fact, conclusions of law and arguments have been rejected as irrelevant, immaterial or lacking legal or evidentiary basis.

For the reasons set forth in the findings and conclusions which follow, an order is being entered directing publication of the finding that respondent has committed repeated and flagrant violations of the PACA, and denying respondent's application for a PACA license.

Findings of Fact

1. Respondent Valencia Trading Co., Inc. is a New York corporation. Its mailing address is 23929 West Valencia Boulevard, Valencia, California 91355. Valencia is owned and operated by Mr. Lloyd Curtis Myers II.

2. Lloyd Myers is also the owner and operator of Lloyd Myers Co., Inc., a California corporation. Its address, 23929 West Valencia Boulevard, Valencia, California 91355, is the same as that of Valencia Trading Co., Inc.

3. Lloyd Myers Co., Inc. is licensed under the PACA.

4. In the period December 15, 1987, through July 6, 1988, Valencia engaged in business operations in interstate or foreign commerce as a dealer in fresh and frozen fruits and vegetables without holding a valid and effective license issued under the PACA.

5. On March 11, 1988, the Department received from the respondent an application for a PACA license. This application was prepared on an obsolete form and was accompanied by incorrect fees. Because of these defects, no action was taken to process the application, and it was returned to the respondent.

6. The respondent submitted a correct and complete application for a PACA license on June 2, 1988.

7. As respondent began its operations, Mr. Myers placed advertisements in "The Packer", a produce industry trade journal. The advertisements were discontinued by "The Packer" in July, 1988, because respondent had failed to pay an invoice for fees dated March 12, 1988.

8. During the period March through May, 1988, respondent purchased, received and accepted 60 lots of lettuce from The Woods Co., Inc., P.O. Box 190, Yuma, Arizona 85364; Sam Andrews' Sons, 401 W. 5th St., Holtville, California 92250; and Action Produce, P.O. Box 1712, 5610 W. Maryland Ave., Glendale, Arizona 85311. Respondent failed to make full payment promptly

of the agreed purchase prices for these lots, in the total amount of $267,421.00. Payments for these purchases were made eight to 71 days after they were due.

9. During the period March through May, 1988, respondent purchased, received and accepted 12 lots of lettuce from Action Produce and Sam Andrews' Sons, but failed to make prompt payment of the agreed purchase prices, which totaled $41,515.40. Full payment for all 12 lots was made by the date of the hearing in this matter.

10. During the period April 18 - 25, 1988, The Woods Co. filed trust notices pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), which were designated nos. 45483 and 45781, involving six of the lots of lettuce referred to in Findings 8 and 9. The total amount set forth in the notices was $45,351.00.

11. During the period May 5 - 11, 1988, Sam Andrews' Sons filed trust notices pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), which were designated nos. 46175 and 46457, involving 19 of the lots of lettuce referred to in Finding 9. The total amount set forth in the notices was $62,844.50.

12. The Department conducted an investigation of respondent's records in the period May 19 - 24, 1988. Subsequent to this investigation, Valencia continued to make purchases from Action Produce and Sam Andrews' Sons. Valencia ceased to operate in early July, 1988.

13. Action Produce received full payment for the purchases referred to in Finding 12 on October 6, 1988. Sam Andrews' Sons received partial payment of $25,000.00 on October 12, 1988, for purchases made during the same period.

14. On October 13, 1988, the date on which the hearing in this matter commenced, Mr. Myers delivered to Mr. Robert S. Andrews, of Sam Andrews' Sons, a draft in the amount of $93,392.25, in purported payment of the balance due for the purchases referred to in Finding 12. Mr. Andrews then testified at the hearing that Sam Andrews' Sons had been paid the full amount owed by Valencia.

15. Subsequent to the hearing, Mr. Andrews discovered that the draft which he received on October 13, 1988, was drawn on insufficient funds and would not be paid by respondent's bank. Mr. Andrews signed a statement to this effect on November 21, 1988. Therefore, respondent remained indebted to Sam Andrews' Sons as of the date of the hearing.

16. In a declaration filed on April 4, 1989, Mr. Robert S. Andrews stated his desire to withdraw his declaration of November 21, 1988. He further stated that he had accepted the $93,392.25 draft from Mr. Myers "as full and final payment" of the Valencia account, that the draft was negotiated, and that his testimony at the hearing as to payment of respondent's debt was correct. The declaration states neither the date on which the draft was accepted as full and final payment nor the date of negotiation.

17. Several checks tendered by respondent to Sam Andrews' Sons and Action Produce in purported payment of debts arising from transactions referred to in Findings 9, 11 and 12 were dishonored by respondent's bank because of insufficient funds in respondent's account.

18. During the period May 19, 1988, through June 30, 1988, respondent refused to give employees of the Department full and complete access to records relating to its operations as a dealer subject to the PACA. Access was sought by the Department to determine whether respondent was operating subject to the PACA, and if so, the length of time it so operated, as well as the extent of its compliance with the recordkeeping, trust maintenance and prompt payment requirements of the PACA.

Conclusions

1. Respondent committed repeated and flagrant violations of sections 2, 3, 4, 6, 8, 9, and 13 of the PACA (7 U.S.C. §§ 499b, 499c, 499d, 499f, 499h, 499i, and 499m) by failing to make full payment promptly for 72 lots of lettuce which it purchased, received and accepted; by operating as a dealer without a valid and effective license; and by refusing to allow employees of the Department full and complete access to books and records relating to its operation subject to the PACA.

2. Mr. Myers' failures to make prompt payment to respondent's creditors, his operation of the respondent as a dealer without a valid and effective PACA license and his refusal to allow employees of the Department full and complete access to records relating to respondent's operation subject to the PACA constitute acts of the character prohibited by the PACA, committed prior to the filing of a license application, within the meaning of section 4(d) of the Act (7 U.S.C. § 499d(d)). Therefore, respondent is unfit for PACA licensing.

Discussion

1. <u>Violations of the Requirement of Full Payment Promptly</u>.

The Perishable Agricultural Commodities Act was designed to protect growers and shippers of fresh fruits and vegetables from a variety of unfair practices engaged in by commission merchants, dealers and brokers. *See, generally*, H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Specifically, it has been held that the PACA was intended by Congress to protect the industry from the financially irresponsible. *V.P.C., Inc.*, 41 Agric. Dec. 734, 741-742 (1982), *citing Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975) and *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967).

The purposes of the PACA are effectuated through a system of licensing, which provides for the assessment of penalties for violations. *See* H.R. Rep. 1041, 71st Cong., 2d Sess. 3 (1930); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)), provides, *inter alia*, that the failure by a commission merchant, dealer or broker to make full payment promptly of debts incurred in transactions in interstate commerce involving perishable agricultural commodities is unlawful. The Department's regulations, 7 C.F.R. § 46.2(aa)(5), define "full payment promptly" as payment

of the agreed purchase price within 10 days after the produce has been accepted. The regulations further provide that parties who elect to vary the terms of payment must reduce their agreements to writing before entering into the transaction. The party who claims the existence of such an agreement bears the burden of proving it. 7 C.F.R. § 46.2(aa)(11); *Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 493 (1987), *aff'd sub nom. Carpenito Bros., Inc. v. United States Dep't of Agric.*, 851 F.2d 1500 (D.C. Cir. 1988) (text in WESTLAW, CTA library); *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 122 (1984).

The evidence adduced in this proceeding shows that respondent failed to make full and prompt payment of the agreed purchase price of produce in 72 transactions involving $308,936.40. In conducting its business in this manner, respondent violated Section 2 of the PACA (7 U.S.C. § 499b). *Atlantic Produce Co., Inc.*, 35 Agric. Dec. 1631 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). Respondent's numerous failures to make prompt and full payment of large sums constitute repeated and flagrant violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980) [, *cert. denied*, 450 U.S. 997 (1981)]; *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom. George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

Respondent concedes that payments to Action Produce, Sam Andrews' Sons and the Woods Company were made on the dates alleged, but argues that the payment terms in these transactions were extended by oral agreements and/or disputes arising from the condition of the produce on delivery. The testimony of employees of Action Produce and Sam Andrews' Sons tends to support respondent's contentions as to the existence of oral agreements. However, as noted above, the requirement of a writing renders such oral agreements completely ineffective to change the statutory definition of prompt payment.

On the issue of disputes, respondent introduced inspection certificates which show that several loads of lettuce exhibited various condition problems on arrival. The existence of a few disputes, resulting in delays of approximately one week, was corroborated by the testimony of employees of Action Produce and Sam Andrews' Sons. However, the record fails to support respondent's contention that the existence of disputes legitimately delayed payment by as much as several months in some transactions. First, the evidence shows that some of the delays in payment resulted from, or were magnified by, Valencia's practice of issuing instruments drawn on insufficient funds. The issuance of a check for the full invoice amount is inconsistent with the existence of a dispute. Therefore, I conclude that there were no disputes as to the transactions corresponding to such checks. Second, Mr. Myers testified that claims as to several loads were filed with trucking companies. In these cases, responsibility was seen to lie with the trucking companies, and not with the seller. The seller was entitled to timely payment of those invoices. Third, the Department's regulations, 7 C.F.R. § 46.2(aa)(11), require prompt payment of the undisputed portion of the amount due in a given transaction. There is no credible evidence that the entire amount due in any

of the transactions at issue was in dispute. Furthermore, it is extremely improbable that a person of Mr. Myers' experience in the industry would purchase load after load of completely worthless produce from the same small group of suppliers. Although one can conceive of exigencies which would dictate this course of conduct, the record contains no evidence of such circumstances.

2. Operation Without a License and Refusal to Allow Access to Records.

Respondent operated as a dealer without a requisite PACA license and refused the Department's employees full and complete access to its books and records.

The record shows confusion over appropriate license application forms and fees, which serves to mitigate the seriousness of the licensing violation. Although no sanction shall be imposed for operating without a license, this course of conduct did violate the PACA and must therefore be noted.

Respondent's failure to allow the Department's investigators full access to its records is a serious violation and must also be noted. It is well established that proper records are essential to effective enforcement of the Department's regulatory programs. *See, e.g., Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 170 (1987), *aff'd sub nom. Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403 (2d Cir. 1987). Although there is no evidence that respondent failed to comply with PACA requirements to *maintain* proper records, those requirements are rendered a nullity unless investigators are fully able to monitor compliance.

3. Disciplinary Sanction.

In cases involving violations by PACA licensees of the prompt payment requirement, payment by the debtor of all amounts due by the date of the hearing results in classification as a "slow pay" matter. If debts remain unpaid as of the hearing date, the matter is classified as "no pay". *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. at 149-150 (1984); *See also Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984). It is the Department's policy to impose the sanction of license revocation in "no pay" cases. Where the violator is unlicensed, and revocation is inapplicable, publication of a finding that the respondent has committed repeated and flagrant violations of the PACA, as well as the facts and circumstances, is the appropriate sanction. Publication has the same effect as license revocation on the violator and persons responsibly connected with the violator. *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. at 124-125; *V.P.C., Inc.*, 41 Agric. Dec. at 748-749 (1982). The evidence adduced in this proceeding shows that the draft in the amount of $93,392.25 given to Mr. Andrews on the date of the hearing was drawn on insufficient funds. Therefore, Valencia remained indebted to Sam Andrews' Sons as of the date of the hearing.

Mr. Andrews' second declaration, which respondent has presented as constituting evidence to the contrary, fails to show full payment by the time

of the hearing. Apparently, some settlement between respondent and Mr. Andrews was achieved subsequent to Mr. Andrews' receipt of the insufficient funds draft. I gather that a payment, covering part of the debt, was made after the first declaration. Mr. Andrews evidently signed the second declaration in response to the kind of economic pressures decried in *Carpenito Bros, Inc.*, 46 Agric. Dec. at 505-506, and *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. at 122-123. Accordingly, this case is properly controlled by the Judicial Officer's "no pay" policies, and the entry of a finding of repeated and flagrant violations is required.

4. Fitness for PACA Licensing.

The stability of the produce industry is critically dependent upon the integrity and mutual trust of industry members. *See Rock Island Fruit Co.*, 39 Agric. Dec. 1171, 1176 (1980). The PACA promotes integrity in the industry in part by conferring broad discretion upon the Secretary to withhold licensing from, *inter alia*, persons with a history of financial irresponsibility or other conduct of the character proscribed by the PACA. The issuance of a license is the Department's attestation to the industry that the licensee will conduct its business in compliance with the Act and applicable regulations. *See Fresh Approach*, 44 Agric. Dec. 2043, 2059 (1985); *V.P.C., Inc.*, 41 Agric. Dec. at 745.

Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides that a license may be denied to a corporate applicant when any corporate officer or holder of nore than ten per cent of the corporation's stock is found to have committed cts of the character prohibited by the PACA prior to the filing of the license pplication.

The evidence of record indicates that Mr. Myers is the sole officer and hareholder of Valencia Trading Co., Inc.; that Valencia's operations are controlled exclusively by Mr. Myers; that Valencia has committed repeated and flagrant violations of the prompt payment requirements of the PACA; that Mr. Myers has operated Valencia without holding a valid and effective PACA license; and that Mr. Myers refused to allow the Department's employees full access to Valencia's records. The evidence of Mr. Myers' involvement in these numerous and serious violations strongly supports the conclusion that the respondent is unfit for PACA licensing.

In a Notice to Show Cause proceeding, it is incumbent upon the respondent to show that the Department's initial denial of a license should not be upheld. *Pappas Produce, Inc.*, 36 Agric. Dec. 684, 692 (1977); *Ludwig Casca*, 34 Agric. Dec. 1917, 1936-1937 (1975). Respondent has adduced neither evidence nor argument sufficient to overcome the Complainant's vidence of PACA violations and other conduct evincing financial rresponsibility and careless disregard for the requirements of law. Accordingly, the Department's initial denial of the respondent's license pplication is affirmed.

Respondent contends that the ALJ's findings of fact are not adequately supported by the record, but the proof herein far surpasses the preponderance of the evidence, which is all that is required.[3] No useful purpose would be served by a lengthy discussion of respondent's arguments on appeal. I agree with Complainant's Reply to Respondent's Appeal filed October 16, 1989 (adopted by reference herein), which demonstrates that the ALJ's findings and conclusions are proper and fully supported by the record.

However, a brief reference to one of respondent's arguments is appropriate. Respondent complains that the ALJ reopened the hearing to receive newly discovered evidence offered by complainant. The ALJ's action is authorized by the rules of practice (7 C.F.R. § 1.146(a)(2)), and respondent was afforded full opportunity to refute the additional evidence, but failed to do so. Furthermore, the newly discovered evidence relates to an issue that has no significance here. Complainant's newly discovered evidence relates to respondent's attempt to show that it should have been issued a license at an earlier date, and that it was in compliance with the payment provisions as of the date of the hearing, making this a "slow pay" case, rather than a "no pay" case, warranting, at most, a license suspension. See *In re The Caito Produce Co.*, 48 Agric. Dec. ____ (June 1, 1989), attached as an Appendix, setting forth the Department's policy in payment violation cases under the Act.

However, we must take respondent's license status as it actually exists at the time a disciplinary order is issued--not as it should have been. If a respondent does not have a license in effect when a disciplinary order is issued, the ALJs and the Judicial Officer have no authority to issue a "license," and then suspend that "license" for a slow-pay violation. If the ALJ and Judicial Officer find that such a person has committed flagrant or repeated violations of the Act, the effects of such a finding on responsibly connected persons are mandated by the Act.[4] The ALJs and the Judicial Officer have no authority to attempt to mitigate the statutorily-mandated sanction as to persons responsibly connected to a violator. (If respondent had been licensed, its license would have been revoked for the violations found here.)

For the foregoing reasons, the following order should be issued.

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[3]*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[4]See *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

Order

The respondent, Valencia Trading Co., Inc., has committed repeated and flagrant violations of § 2 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b).

The facts and circumstances set forth above shall be published.

The application for a license made pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), by respondent, Valencia Trading Co., Inc., is denied.

This order shall take effect on the 30th day after service of this decision on respondent.

APPENDIX

In re The Caito Produce Co., 48 Agric. Dec. ___ (June 1, 1989).

In re: WILLIAMSPORT PURVEYORS, INC.
PACA Docket No. D-88-540.
Decision and Order filed December 21, 1989.

Responsibly connected persons.

The Judicial Officer affirmed Judge Kane's (ALJ) order denying respondent's application for a license on the ground that Harvey C. Boatman, who is effectively respondent's sole officer, director and shareholder, had engaged in acts of the character prohibited by the Act. Respondent erroneously argues that the ALJ's inquiry should have been limited to the conduct of Mr. Boatman as it relates to respondent. But there is no such limitation in the statute (7 U.S.C. § 499d(d)), and, therefore, the ALJ properly considered all of the conduct by Mr. Boatman of a character prohibited by the Act. Effie I. Boatman was the owner of 100% of the capital stock of respondent, and Mr. Boatman is her Executor. As such, Mr. Boatman is the sole officer of the respondent within the meaning of the Act (7 U.S.C. § 499d(d)).

Edward M. Silverstein, for Complainant.
Richard A. Gahr, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Paul Kane (ALJ) filed an Initial Decision and Order on April 28, 1989, denying respondent's application for a license on the ground that Harvey C. Boatman, who is effectively respondent's sole officer, director and shareholder, had engaged in acts of the character prohibited by the Act.

On June 5, 1989, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5

See generally Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On June 26 1989, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the Initial Decision and Order is adopted as the final Decision and Order, with minor changes in brackets. Respondent erroneously argues on appeal that the ALJ's inquiry should have been limited to the conduct of Mr. Boatman as it relates to respondent. But there is no such limitation in the statute (7 U.S.C. § 499d(d)), and, therefore, the ALJ properly considered all of the conduct by Mr. Boatman of a character prohibited by the Act.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This decision is promulgated pursuant to the Administrative Procedure Act, as amended, 5 U.S.C.A. §§ 554, 557 (1977 and Supp. 1989) and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130 - 1.151 (1988). This is a notice to show cause proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C.A. §§ 499a - 499s (1980 and Supp. 1988), hereinafter referred to as the Act or PACA, instituted by a Notice to Show Cause filed on August 11, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Notice to Show Cause alleges that Mr. Harvey C. Boatman is, effectively, the sole officer, director and shareholder of the respondent corporation, and that Mr. Boatman's history of violations of the PACA renders him unfit for licensing under the Act. The respondent filed an answer on August 29, 1988, in which Mr. Boatman challenges the allegations of the Notice to Show Cause.

An oral hearing was held on September 23, 1988, in Williamsport, Pennsylvania, before the undersigned. Richard A. Gahr, Esq., Williamsport, Pennsylvania, appeared on behalf of the respondent. Edward M. Silverstein, Esq., Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the complainant.

Based upon the evidence of record, it is concluded that the respondent is unfit for licensing under the PACA. Accordingly, an order shall be issued denying respondent's application for a PACA license.

**The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Applicable Statutes and Regulations

Section 2(4) of the PACA, 7 U.S.C.A. § 499b(4) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction [in] any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title[.]

Section 3(a) of the PACA, 7 U.S.C.A. § 499c(a) further provides, in part:

(a) After December 10, 1930, no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subsection shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

Section 4(a) of the PACA, 7 U.S.C.A. § 499d(a),(d) requires:

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided*, That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further*, That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 499c(b) of this title, plus $5,

which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 499c(b) of this title: *And provided further*, That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination.

* * *

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant,. . . or in case the applicant is a corporation, any officer or hol der of more than ten per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court. . . . If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant. . . or in case the applicant is a corporation, any officer or holder of more than ten per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter. . . the Secretary may refuse to issue a license to the applicant.

Section 8(a) of the PACA, 7 U.S.C.A. § 499h(a),(b) mandates the following:

(a) Whenever (a) the Secretary determines as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

* * *

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person--

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violations was suspended and the suspension period has expired or is not in effect;

. . . .

The Secretary may approve such employment. . . after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act. . . . The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

Seven C.F.R. § 46.2(aa) (1988) states in part:

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

Findings of Fact

1. Williamsport Purveyors, Inc., the respondent, is a Pennsylvania corporation. The respondent proposes to do business as Williamsport Produce and Seafood, at 1410 High Street, Williamsport, Pennsylvania. (Notice to Show Cause ¶2; Answer ¶2; CX A; TR 23-24) [1]

[1] "CX" followed by a numeral or character refers to exhibits offered by complaint counsel. "RX" followed by a numeral or character refers to exhibits offered by respondent's counsel. "TR" refers to the numbered pages of the transcript of the hearing held on September 23, 1988.

2. Respondent, on its application for a license to operate subject to the PACA, reported that the Estate of Effie I. Boatman, deceased April 8, 1988, was its sole officer, director and shareholder, and that Harvey C. Boatman, as Executor, would act in the capacity of director and officer of the applicant for and on behalf of the Estate. (Notice to Show Cause ¶3; Answer ¶3; CX A; TR 23-24, 30)

3. Harvey C. Boatman was president, treasurer, director and 100 per cent shareholder of Rinella's, Inc., a Pennsylvania corporation, also trading as Rinella's Wholesale Fruit and Produce, Inc. (hereinafter "Rinella's"), which held a license to operate subject to the PACA from July 7, 1977, through May 17, 1985. (Notice to Show Cause ¶5; Answer ¶5)

4. An administrative disciplinary complaint, assigned PACA Docket No. 2-6695, was filed against Rinella's. The complaint alleged that Rinella's failed to promptly pay four sellers $163,576.58 for 88 lots of fruits and vegetables which it received and accepted in interstate commerce. On March 27, 1985, Administrative Law Judge Victor W. Palmer issued a Decision and Order finding that Rinella's had committed repeated and flagrant violations of the PACA and revoking its license. The order became final on May 6, 1985 and effective on May 17, 1985. *See Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1233 (1985). Rinella's filed an untimely petition for reconsideration which was denied on May 20, 1985, and an untimely appeal to the Secretary which was denied on June 3, 1985. *See Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1240 (1985). Thereafter, Mr. Boatman was advised by letter that, because he had been responsibly connected with Rinella's, he was ineligible for employment by a PACA licensee until May 17, 1986. The letter also stated that Mr. Boatman's subsequent licensing and employment would be subject to approval by the Secretary and the posting of a satisfactory surety bond. (Notice to Show Cause ¶6; Answer ¶6; CX B and E; TR 24-25, 63)

5. Subsequent to the revocation of Rinella's' PACA license, an investigation of its activities by the Department revealed that, during the period May 20, 1985, through January 6, 1986, Rinella's was operating subject to the PACA without holding a valid and effective PACA license, in apparent violation of section 3(a) of the PACA, 7 U.S.C.A. § 499c(a). Accordingly, a civil action, assigned No. 86-0889, was instituted in the United States District Court for the Middle District of Pennsylvania. On February 2, 1987, the Court issued an order, to which Rinella's had consented, enjoining Rinella's, its associates, agents, employees and others, from engaging in business subject to the PACA without holding a valid and effective PACA license, and imposing a civil penalty in the amount of $5,000.00. The order recognized that Mr. Boatman, among others, would be required to furnish a four-year surety bond, satisfactory to the Secretary, as a condition of employment, if employment commenced prior to May 17, 1987. (Notice to Show Cause ¶7 Answer ¶7; CX C; TR 25-26)

6. Pursuant to the licensing provisions of the PACA, license no. 870633 was issued to Williamsport Produce and Seafood, Inc., (hereinafter "Williamsport Produce"), a Pennsylvania corporation, on February 10, 1987. In its license application, Williamsport Produce stated that its sole principal was Effie I. Boatman. (Notice to Show Cause ¶8; Answer ¶8)

7. On September 8, 1987, an administrative proceeding, assigned PACA Docket No. 2-7659, was instituted against Williamsport Produce because it had engaged Mr. Boatman whose employment was restricted pursuant to the order by which Rinella's' license had been revoked. During this period, Mr. Boatman had exclusive authority to manage, direct and control the business operations of Williamsport Produce. On February 18, 1988, Administrative Law Judge Edwin S. Bernstein issued a Decision and Order finding that Williamsport Produce had violated section 8(b) of the PACA, 7 U.S.C.A. § 499h(b), by employing Mr. Boatman in the period March 13, 1987 through May 17, 1987, without posting the required surety bond and without obtaining the approval of the Secretary. The order suspended the PACA license of Williamsport Produce for the 62-day period April 8, 1988 through June 9, 1988. *See Williamsport Produce, Inc.*, 47 Agric. Dec. ___ (1988). (Notice to Show Cause ¶9; Answer ¶9; CX D; TR 10-12, 26, 28-29)

8. During the period April 8, 1988, through May 23, 1988, respondent, under the direction and control of Mr. Boatman, engaged in business subject to the PACA, without holding a valid and effective PACA license. During this period, respondent purchased and accepted in excess of 200,000 pounds of fruits and vegetables. (Notice to Show Cause ¶10; Answer ¶10; CX F; TR 11-15, 53)

9. The respondent's application for a PACA license indicates that it has operated subject to the PACA, without holding a valid and effective license, since December 1, 1987. (Notice to Show Cause ¶11; CX A; TR 23-24, 53, 72)

Conclusion

Based upon the evidence adduced in this proceeding, it is concluded that Mr. Harvey C. Boatman, who is, effectively, the respondent's sole officer, has repeatedly committed acts of the character prohibited by the PACA, and that the respondent corporation which he controls is unfit for licensing under the PACA.

Discussion

The Perishable Agricultural Commodities Act was designed to protect growers and shippers of fresh fruits and vegetables from a variety of unfair practices engaged in by commission merchants, dealers and brokers. *See, generally*, H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Specifically, it has been held that the PACA was intended by Congress to protect the industry from the financially irresponsible. *V.P.C., Inc.*, 41 Agric. Dec. 734, 741-742 (1982), *citing Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975) and *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967).

The purposes of the PACA are effectuated through a system of licensing, which provides for the assessment of penalties for violations. *See* H.R. Rep. 1041, 71st Cong., 2d Sess. 3 (1930); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974). The Act confers broad discretion upon the Secretary to bar from the industry, *inter alia*,

persons with a history of financial irresponsibility or other conduct of the type proscribed by the PACA. The issuance of a PACA license is the Department's attestation to the industry that the licensee will conduct its business in compliance with the Act and applicable regulations. *See Fresh Approach*, 44 Agric. Dec. 2043, 2059 (1985); *V.P.C., Inc.*, 41 Agric. Dec. at 745.

The Act, 7 U.S.C.A. § 499d(d), provides that the Secretary *may* deny a license to a corporate applicant if he finds that an officer or ten per cent shareholder of the corporation has committed acts of the character prohibited by the PACA. Thus, even where the commission of such acts by a corporate officer is established, the ultimate determination of fitness for licensing is committed to the discretion of the Secretary.

The evidence adduced in this proceeding clearly shows that Mr. Harvey C. Boatman has committed acts of the character prohibited by the PACA. Mr. Boatman was president, treasurer, director and 100 per cent shareholder of Rinella's Wholesale Fruit and Produce, Inc., which was found to have committed repeated and flagrant violations of the PACA (Finding 4). Subsequent to the Department's revocation of Rinella's license, Mr. Boatman continued to operate the business without a license, in violation of Section 3a of the Act, 7 U.S.C.A. § 499c(a) (Finding 5). After the U.S. District Court for the Middle District of Pennsylvania permanently enjoined Rinella's from operating without a PACA license, Mr. Boatman operated under the mantle of another corporation, Williamsport Produce. This corporation, which he substantially controlled, employed him without posting a satisfactory surety bond and without obtaining the approval of the Secretary, in violation of Section 8b of the PACA, 7 U.S.C.A. § 499h(b). As a consequence of this violation, a disciplinary proceeding was brought against Williamsport Produce, and its license was suspended for a period of 62 days (Finding 7). The evidence shows that Mr. Boatman [operated respondent during the period April 8, 1988, through May 23, 1988, without holding a valid and effective PACA license,] in violation of Section 3a of the PACA, 7 U.S.C.A. § 499c(a) (Finding 8).

In this Notice to Show Cause proceeding, it is incumbent upon the respondent to show that the Department's initial denial of a license should not be upheld. *Pappas Produce, Inc.*, 36 Agric. Dec. 684, 692 (1977); *Ludwig Casca*, 34 Agric. Dec. 1917, 1936-1937 (1975). Complainant's evidence of Mr. Boatman's involvement in numerous violations of the PACA by Rinella's, Williamsport Produce and the respondent strongly supports the conclusion that the initial denial of a license to the respondent should be affirmed. Respondent has presented neither evidence nor argument which is sufficient to overcome the complainant's evidence and the conclusion which it compels, namely, that Mr. Boatman's participation, as an officer, in the affairs of the respondent is likely to result in additional violations of the Act.

The Act, 7 U.S.C.A. § 499d(d), reflects the judgment of Congress that persons who are officers of a corporation or holders of ten percent or more of its stock are positioned to influence corporate functions. Therefore, the character and conduct of these persons is held to a high standard. As of the date of the hearing in this matter, Mr. Boatman was not, technically, an

officer of Williamsport Purveyors, but was acting as such as an agent on behalf of the estate of Effie I. Boatman. Therefore, the issue which must be resolved in order to determine the validity of the Department's initial denial of respondent's application is whether Mr. Boatman, acting in his capacity as executor and personal representative of the estate of the corporation's sole officer and shareholder, is an officer within the meaning of Section 4(d).

Under Pennsylvania law, the executor or personal representative of an estate is charged with the duty to take custody of the decedent's property. *See* 20 Pa. Cons. Stat. Ann. § 3311 (Purdon 1975); *In re Wallis' Estate*, 218 A.2d 732 (1966). The power to manage the property of the estate specifically includes the power to vote stock. *See* 20 Pa. Cons. Stat. Ann. § 3320 (Purdon 1975). In the absence of authorization by court order, the executor generally has no right to continue indefinitely a business which was owned by the decedent. *See In re Kurkowski's Estate*, 409 A.2d 357 (1979); 20 Pa. Cons. Stat. Ann. § 3314 (Purdon 1975). However, the executor may properly assume control of and continue the decedent's business for a limited time, if such continuation is consistent with the objective of eventual liquidation and distribution of the estate's assets. *In re Kurkowski's Estate*, 409 A.2d at 361.

The propriety of continuing a decedent's business is a question of the executor's fiduciary duty to the decedent's legatees. However, whether or not continuation is consistent with the executor's fiduciary duty, there is no doubt as to his *legal capacity* to assume absolute control of a corporation, such as the respondent, of which the decedent was the sole officer and shareholder. *See, e.g.*, 20 Pa. Cons. Stat. Ann. §§ 3319, 3320, 3351 (Purdon 1975).

The maintenance of the estate of Effie I. Boatman, as an entity under Pennsylvania law, need not be pursued in this proceeding, and no evidence pertaining to this question exists in the record. The issue of importance is the extent of Mr. Boatman's actual power to direct those activities of the respondent corporation which are subject to the PACA. It is clear that Mr. Boatman's authority, as executor of Effie I. Boatman's estate, to vote the shares of the corporation of which the decedent was the sole officer and shareholder is necessarily the authority to exercise absolute control over all corporate activities, including those subject to the PACA.

In sum, examination of the applicable law and the evidence of record indicates that Mr. Boatman has the legal capacity to, and in fact does, exercise full control over Williamsport Purveyors. (Finding 8) In the circumstances of this case, effectuation of the purposes of the PACA requires the conclusion that Mr. Boatman is the sole agent of the owner of 100% of the capital stock of respondent and the sole officer of the respondent within the meaning of Section 4d of the Act, 7 U.S.C.A. § 499d(d), and that the respondent is unfit for PACA licensing by reason of Mr. Boatman's capacity to control the conduct of its business.

Order

Respondent's application for a license under the Perishable Agricultural Commodities Act is denied.

Copies hereof shall be served on the parties.

REPARATION DECISIONS

NORTH AMERICAN PRODUCE BUYERS, LTD. v. SOURCE PRODUCE DISTRIBUTING CO.
PACA Docket No. 2-7675.
Decision and Order issued July 25, 1989.

Brokers - duties of.

A broker has a duty to act in the best interests of the seller and receiver. Where a broker diverted a truckload of produce for its own purposes, as a result of which the truck was delayed, causing produce not to make good delivery, broker is liable for damages incurred because it has breached its duty as a fiduciary.

Dennis Becker, Presiding Officer.
Floyd D. Gadsby, for Complainant.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed on December 11, 1986, in which complainant seeks a reparation award against respondent in the amount of $10,628.47 in connection with the sale and shipment of produce in interstate and foreign commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying the material allegations of the complaint. Since the amount claimed in the formal complaint does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Complainant, North American Produce Buyers, Ltd., is a corporation located in Toronto, Canada. Respondent, Source Produce Distributing Co., is a corporation located in Glendale, Arizona. At the time of the transaction involved in this proceeding, respondent was licensed under the Act.

Findings of Fact

1. On May 7, 1986, complainant, through respondent, which acted as the broker, purchased in interstate and foreign commerce plums and peaches from California, and attempted to purchase grapes from Arizona. The truck carrying the peaches was loaded on May 7, 1986, and May 8, 1986, with the plums and peaches, and proceeded to Glendale, Arizona, where it unloaded for respondent some peaches not purchased by complainant. The truck was supposed to pick up grapes which were ordered by complainant in Nogales, Arizona. However, due to the actions of respondent in accommodating the trucker by allowing it to pick up peaches not destined for complainant the truck was late on arrival in Arizona, and could not pick up the grapes.

2. After a further delay after delivering peaches to respondent, and negotiations between respondent and complainant, complainant agreed to fill the truck with lettuce from New Mexico. The truck proceeded to New Mexico, where 600 cartons of lettuce were loaded on May 13, 1986. At an uncertain time the truck and/or its refrigeration unit broke down. On May 16, 1986, the truck arrived in Canada where the peaches, plums, lettuce were unloaded, and received and accepted by respondent.

3. May 16, 1986, was a Friday. Monday, May 19, 1986, was a Canadian Holiday. Complainant secured an inspection on May 20, 1986. It showed with respect to 116 cartons of lettuce that there were 46% condition defects, with respect to 87 cartons of plums that there were 30% condition defects, and that with respect to 512 cartons of peaches there were 61% condition defects.

4. The invoice with respect to the plums shows that complainant bought from Giumarra Farms, Inc., 120 cartons of plums for a total contract price of $3,564.00, f.o.b. Complainant paid Giumarra Farms this amount.

5. The invoice with respect to the peaches shows that respondent bought from Venida Packing, Inc., 528 cartons of peaches for $8,840.10. Complainant paid Venida Packing, Inc., that amount.

6. The invoice with respect to the lettuce shows that respondent bought 600 cartons of lettuce from Billy the Kid Produce Company for a total contract price of $3,037.50. Complainant paid Billy the Kid Company this amount.

7. Complainant paid the three sellers of produce a total of $15,441.60. It provided accounts of sale which showed that on resale it received $1,480.00 Canadian dollars for the peaches, and $522.00 Canadian dollars for the plums, for a total of $2,002.00 Canadian dollars. The record does not show what it received with respect to the lettuce.

8. Complainant claimed that the market value in Canadian dollars for the peaches and plums was $16,563.00, from which it deducted the $2,002.00 Canadian dollars realized on the resale of the peaches and plums for a loss of $14,563.00 Canadian, or $10,628.47 U.S..

9. The $3,564.00 paid for the plums plus the $8,840.10 paid for the peaches amounts to $12,404.10. The $2,002.00 Canadian received on resale of the peaches and plums amounts to $1,459.85, when converted at the rate of $1.37 Canadian dollars for each United States dollar. Therefore, the net loss to complainant with respect to the peaches and the plums was $10,944.25.

Conclusion

This case involves an extremely convoluted factual situation in which the complainant, a foreign corporation paid it suppliers for peaches, plums, and lettuce which it purchased, and seeks to recover the payments from the respondent, the broker with respect to the transaction. Pursuant to 7 C.F.R. § 46.28(a):

> The function of a broker is to negotiate, for or on behalf of others, valid and binding contracts. A broker who fails to perform any specification or duty, express or implied, in connection with any transaction is in violation of the Act and is subject to the penalties

specified in the Act and may be held liable for damages which accrue as a result thereof. It shall be the duty of the broker to full inform the parties concerning all of the terms and conditions of the proposed contract . . . . If the broker's records do not support his contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence, or for other penalties provided by the Act for failure to perform his express or implied duties. The broker shall take into consideration the time of delivery of the shipment involved in the contract and all other circumstances of the transaction, in selecting the proper method for transmitting the written confirmation or memorandum of sale to the parties . . . .

It is a responsibility of a broker to bring two parties together for their mutual benefit in negotiating the purchase and sale of produce. A broker may also undertake other duties, such as arranging for transportation. It is at least an implied requirement that the broker assure, if it does arrange transportation, that the transportation is reasonable in terms of time and type,and that it does not act in a manner that undermines the ability of the shipper to ship a good commodity, so that the receiver may market it in an orderly fashion. Based upon our analysis of the facts in this record we conclude that respondent, acting as the broker, undermined the contract between the two shippers in California of plums and peaches, and complainant. The facts of record show that the original contract between complainant and various shippers called for the purchase of peaches, plums, and grapes. Complainant did not know the point of origin of these products. Respondent, as the broker, however, did know that the peaches and plums were to come from California, and the grapes from Nogales, Arizona. In and of itself this is an arrangement which is unusual because of the distance between Bakersfield, California and Nogales, Arizona. However, it is not fatal to the defense of respondent. However, in addition, after the peaches and plums were loaded in California, the trucker asked the broker to allow it fill the out the empty portion of the truck with more produce. The broker agreed that such could be done, and that the trucker should put peaches on board the truck for delivery to respondent in Glendale, Arizona. As respondent stated in its answer:

On Thursday, Will Baldwin called Poulos of Source Produce and asked for additional freight to be dropped in Phoenix to fill out his truck. Baldwin would drop the additional freight in Phoenix and then proceed to Nogales for the grape pick up. Although Baldwin was secured by North American, Source agreed to provide additional freight for the truck so that Baldwin could receive additional revenue on this truck.

The grape pick up was scheduled for Nogales on Friday, May 9, 1986. The truck did not deliver the freight to Phoenix until Saturday, May 10, 1986. Consequently, Baldwin missed his Nogales pick up scheduled for May 9, 1986. Because of the late Phoenix delivery, the grapes were no

> longer available for loading in Nogales. The partial delivery to Phoenix was at Baldwin's specific request.
>
> Since the grapes were no longer available, North American agreed to fill the load with lettuce for pickup in New Mexico. The truck made its Phoenix drop and proceeded to New Mexico for the lettuce pickup. On route to New Mexico the truck experienced refrigeration problems which caused the truck to return to Phoenix for repairs. As a result, the lettuce was not delivered until May 13, 1986.

We believe the above statement made by the respondent is a very strong admission that it failed to carry out its duties as a broker. Rather than allowing complainant's trucker to deal with complainant, the broker interfered, and acted in a manner which was contrary to the interest of complainant. Indeed, it admits the grapes could not be picked up because the trucker was late in arriving in Nogales, Arizona. It then proceeded to have the truck continue to New Mexico to pick up lettuce. This strikes us as being a very strange arrangement. Instead of going closer to Canada the truck was moving away from Canada. Even accepting as true the statement by respondent that the truck broke down sometime between May 10, 1986, and May 13, 1986, and that the refrigeration unit did not work and had to be repaired, had the produce gone directly from California to Canada, or even had it left Nogales, Arizona on May 9, as it should have, it would have been sufficiently close to Canada that we could try to impute responsibility for the break down of the refrigeration to complainant. Under the circumstances here we cannot do so. Respondent, through its own negligence, caused the truck to be unduly delayed. It simply did not carry out its duties as a broker in a manner which was responsible.

Having determined that respondent was the cause of the truck being as late as it was in arriving in Canada, it is necessary to determine whether complainant is entitle to damages. Complainant paid the full contract amount to the sellers with respect to the peaches, plums, and lettuce. It also had an inspection performed at as early a date as it could. The inspection showed with respect to the lettuce that only 116 out of 600 cartons were inspected, the remainder of the lettuce having been otherwise disposed of. Under such circumstances, it being a long-standing precedent that an inspection of less than one-half of a load cannot said to be indicative of the entire load, we cannot award damages to complainant against respondent with respect to the lettuce. In any event, complainant did not seek damages. With respect to the peaches, however, the inspection certification showed that 512 cartons were inspected, showing 60% decay and 1% soft. Respondent provided an account of sale which showed that it received returns of $1,480.00 Canadian dollars on the peaches. With respect to the plums, the record shows that there was an inspection of 87 out of 120 cartons of the plums. The inspection showed that there were 30% condition defects, including 16% decay. The record also shows that respondent received a net of $522.00 Canadian dollars with respect to its resale of the plums.

In computing damages we find that complainant is entitled to nothing with respect to the price of the lettuce. It is entitled to $3,564.00 for the plums, and $8,840.00 for the peaches, for a total entitlement in the United States dollars of $12,404.10. From this must deducted the $1,459.85 U.S., as computed on the basis of 1.37 Canadian dollars per dollar fetched, based upon $2,002.00 Canadian net on resale, which leaves complainant entitled to $10,944.25 U.S. Complainant computed its entitlement on the basis of what it considered to be full market value in terms of Canadian dollars of $14,563.00 Canadian dollars or $10,628.47 U.S. Since it requested less than the $10,944.25 to which we find it is entitled, we shall award only that which it requested. Complainant is entitled to $10,628.47. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation must be awarded with interest.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $10,628.47, with interest thereon at the rate of 13% per annum from June 1, 1986, until paid.

Copies of this Order shall be served upon the parties.

RICHARD RUIZ, d/b/a RUIZ PRODUCE CO. v. PACIFIC SUN PRODUCE CO.
PACA Docket No. R-88-200.
Decision and Order issued August 29, 1989.

Accord and Satisfaction.

Where respondent tendered a check for less than the full contract amount with an ambiguous statement as to its release from further liability, it was held the statement was too general to result in accord and satisfaction. It was further held that the mere declaration there is a dispute does not create a valid dispute.

Dennis Becker, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed on February 22, 1988, in which complainant seeks a reparation award against respondent in the amount of $3,018.00 in connection with the sale and shipment of a mixed load of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying the material allegations of the complaint. Since the amount claimed in the formal complaint does not exceed

$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.

Complainant, Richard Ruiz, is an individual doing business as Ruiz Produce Company who is located in Edinburg, Texas. Respondent, Pacific Sun Produce Co., is a corporation located in Los Angeles, California. At the time of the transaction involved in this proceeding, respondent was subject to license under the Act.

Conclusions

On October 17, 1987, complainant sold and shipped to respondent a mixed load of produce consisting of jalapeno peppers, cucumbers and bell peppers, for a total contract price of $9,628.00, delivered. Respondent paid complainant $6,610.00 by a check dated December 11, 1987, on the obverse of which was the statement "Endorsement of this check constitutes payment in full or any and all claims against payor." Respondent claims that when complainant negotiated the check on December 11, 1987, an accord and satisfaction was achieved. Respondent is wrong. Accord and satisfaction requires a valid dispute, tender of an amount less than the original amount agreed on, which tender is clearly offered as payment in full, and acceptance of the tender. *See Mendelson-Zeller Co., Inc. v. Michael J. Navilio, Inc.*, 34 Agric. Dec. 903 (1945); 1 Am. Jur., Accord and Satisfaction, Section 22 *et seq.* In our view, respondent's statement is ambiguous, and even if it were clear, there was no valid dispute.

We cannot accept a general statement on the obverse side of a check that endorsement by the payee will release the payor from all obligations to the payee as meeting the notice requirement under the principle of accord and satisfaction. The statement must clearly refer to a specific transaction, or specific transactions. Otherwise, all interested parties lack any frame of reference as to those transactions as to which the payor claims there is a valid dispute.

Neither can we find that there was a valid dispute. Respondent acknowledged in its answer that the original contract price was $9,628.00. It appended thereto some documents which purported to show it was entitled to deductions. Two of these documents were inspection reports by the Los Angeles County Agricultural Commission/Weights & Measures. A report dated November 9, 1987, reflected 280 cartons of bell peppers had considerable decay. A report dated October 21, 1987, reflected that the 1000 cartons of jalapeno peppers had condition defects. However, these inspections are not federal inspections, and the findings contained thereon do not have *prima facie* evidentiary value. While the 280 cartons of bell peppers were apparently donated to charity, an inspection 23 days after sale cannot be said to indicate their condition on arrival. There is no record as to what was done with the jalapeno peppers, or what damages respondent may have suffered. The bare possibility it may have suffered damages is not sufficient for us to conclude that there was a valid dispute as to how much respondent should pay.

Respondent also appears to have withheld $390.00 as a setoff for brokerage owed to it by complainant. However, it did not plead a setoff as a defense. Therefore, we lack jurisdiction to consider it.

In view of the above, we find that respondent has failed to pay complainant $3,018.00. Its failure to pay this amount is a violation of section 2 of the Act for which reparation must be awarded with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,018.00 with interest thereon at the rate of 13 percent per annum from November 1, 1987, until paid.

Copies of this order shall be served upon the parties.

SALINAS MARKETING COOPERATIVE v. FRED MEYER, INC.
PACA Docket No. R-88-170.
Decision and Order issued August 31, 1989.

Brokers - value of statements - Misrepresentation - right to repudiate rescission of contract.

Where the broker represented respondent in the reparation proceeding, its statements cannot be given any weight. Because the broker failed to convey to the seller the first inspection of broccoli, which showed that it made good delivery, seller had right to repudiate its subsequent agreement to change the terms of the contract because it had been materially misled as to the condition of the goods.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, for Complainant.
Respondent, Pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on July 27, 1987, in which complainant seeks a reparation award against respondent in the amount of $8,043.20 in connection with the sale and shipment of two lots of broccoli in interstate commerce. A formal complaint was filed on December 6, 1987. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying the material allegations of the complaint. Respondent also filed a counterclaim for $2,021.46. Since the amounts claimed in the formal complaint and counterclaim do no exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R.§ 47.20) is applicable. Complainant, Salinas Marketing Cooperative, is a corporation located in Salinas, California. Respondent, Fred Meyer, Inc., is a corporation located in Portland, Oregon. At the time of the transactions involved in this proceeding, both parties were licensed under the Act.

Findings of Fact

1. On June 9, 1987, complainant sold to respondent 576 cartons of No Grade broccoli at $5.00 a carton for a total price of $2,880.00 plus $.20 per carton for brokerage, or $115.20, for a total contract price of $2,995.20, f.o.b. The broccoli was shipped from California to Oregon on June 9, 1987, and arrived at respondent's place of business on June 10, 1987, where it was unloaded from the truck, and therefore received and accepted.

2. On June 9, 1987, complainant sold to respondent 960 cartons of No Grade broccoli at $5.00 a carton for a total price of $4,800.00 plus brokerage at $.20 per carton, or $192.00 and top ice of $56.00, for a total contract price of $5,048.00, f.o.b. The broccoli was shipped in interstate commerce from California to Oregon on June 9, 1987, and arrived at respondent's warehouse on June 11, 1987, where it was unloaded, and therefore received and accepted.

3. J.B.J. Distributing, Inc., located in La Habra, California, was the broker with respect to both transactions.

4. The 576 cartons of broccoli where subjected to a federal inspection on June 10, 1987. The inspection showed in pertinent part that there were 10% condition defects in the form of yellow flowering buds, and that the temperature of the broccoli was 33° - 35° Fahrenheit. Because of the percentage of condition defects the broccoli made good delivery.

5. The 576 cartons of broccoli were subjected to a further federal inspection on June 11, 1987. The inspection showed a total of 45% condition defects, including 4% yellow flowering buds, 38% yellowing bud clusters, and 3% bruising.

6. The 960 cartons of broccoli were subjected to a federal inspection on June 11, 1987. That inspection showed 8% yellow flowering buds, 4% bruising, and 12% yellowing bud clusters.

7. 552 of the 576 cartons were subjected to a federal inspection on June 17, 1987. The inspection showed in pertinent part that there were 71% yellow bud clusters, and that the pulp temperature of the broccoli was 50°-55° Fahrenheit.

8. The 960 cartons of broccoli were subjected to a federal inspection on June 17, 1987. The federal inspection showed in pertinent part that there were 59% yellow bud clusters, and that the temperature of the pulp was 51°-52° Fahrenheit.

9. J.B.J. Distributing Company represented respondent with respect to the dispute involved in this proceeding.

10. Complainant was not notified of the results of the June 10, 1987, inspection until a long time after the transaction had occurred.

11. When notified of the results of the June 11, 1987, federal inspections complainant agreed that the broccoli could be placed elsewhere.

12. Two individuals who provided affidavits on behalf of respondent did not see the broccoli. Mr. Mark Rossi, of Najdek Produce, Inc., looked at the broccoli on June 17, 1987, and noted that the temperatures were very high, and that the broccoli had a foul odor.

13. As a result of the failure of respondent, through its captured broker, J.B.J. Distributing, to notify complainant in a timely fashion of the results of

the June 10, 1987, federal inspection, complainant was misled to its detriment with respect to a material fact.

14. Respondent has not paid complainant any portion of the $8,043.20 involved in the two transactions in this proceeding.

Conclusion

This proceeding involves an unusually well documented dispute between complainant and respondent as regards what transpired with respect to the sale and shipment of two loads of broccoli from California to Oregon. There are a number of factual and legal issues which must be resolved in order to determine whether respondent is liable for the purchase price of the broccoli or whether complainant is liable for costs incurred by respondent.

Initially, we must note that the actions of the broker J.B.J. Distributing, Inc., are quite unusual. J.B.J. Distributing acted as the legal representative of respondent with respect to this transaction. While normally the statements of brokers are entitled to great weight, we cannot give any weight to its statements in this instance because it is obvious that it was captured by respondent, and became solely responsible for the presentation of respondent's case. We suspect this is the situation because respondent is a retail outlet consisting of sixty-five stores. Under such circumstances it would be to the advantage of the broker to stay in the good graces of such a large client.

We are particularly concerned in this instance with the fact that although the 576 cartons of broccoli arrived one day after shipment, the 960 cartons of broccoli did not arrive until two days after shipment. Of even more concern is the fact that when the two loads of broccoli arrived at respondent's place of business they were unloaded. The act of unloading normally constitutes an act of acceptance, as a result of which the receiver has the burden to show it suffered damages. *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). In this instance, however, as complainant acknowledges, the broker got in touch with it and conveyed to it the results of federal inspections on June 11, 1987, with respect to the two loads. The federal inspections showed considerable condition defects. As a result, and complainant acknowledges such, complainant agreed that the broker should try to get the broccoli placed elsewhere. However, complainant states, and the record is clear, that it did not at that time know that there had been or the results of the June 10, 1987, inspection of the 576 cartons of broccoli. That inspection showed only 10% condition defects in the form of yellow flowering buds. Pursuant to 7 C.F.R. 51.523 and 7 C.F.R. 51.3560, 10% condition defects for broccoli at destination do not show that it was not in suitable shipping condition when shipped. Based upon long-standing precedent, complainant is entitled to repudiate its agreement that the 576 cartons of broccoli should be placed elsewhere because it was misled by a material misrepresentation in the form of a failure on the part of complainant through its agent J.B.J. Distributing to notify it of the results of a federal inspection at the time of arrival. See *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982). We find that complainant is also entitled to repudiate its grant of permission that the 960

cartons of broccoli in the second load be placed elsewhere because it was undoubtedly influenced by the information it received simultaneously with information with respect to the first load.

The issue that remains for resolution is whether respondent otherwise proved damages. We find that it did not do so. Although some efforts were made to find other outlets for the broccoli, none could be found. Respondent provided the affidavit of two wholesale houses as regards its efforts to dispose of the broccoli. In one instance the affiant, Emil Nemarik of Pacific Coast Fruit Company, swore that he never looked at the broccoli. Therefore, he could not testify as to its condition. So also is the case with the affidavit of Joe M. Caruso of Caruso Produce, Inc. Mr. Caruso testified as to a statement made to him by one of his employees. He had no direct knowledge of the condition of the broccoli when it was looked at by his employee on June 11, 1987. While hearsay is permitted in proceedings of this nature, the statements of Mr. Caruso are simply too far removed for us to give them any credibility. On the other hand, complainant provided an affidavit by Mr. Mark Rossi of Najdek Produce, Inc., which showed that Mr. Rossi actually looked at the broccoli on June 17, 1987, and saw that its temperature was approximately 50° Farenheit. Such high temperature clearly indicates that complainant was not maintaining the broccoli under proper cooling conditions from June 10, 1987, and June 11, 1987, respectively. Furthermore, the federal inspections on June 17, 1987, preparatory to the dumping of the broccoli showed very high temperatures. In the case of the 552 out of 576 cartons the temperature was stated to be at 51-52 degrees.

We are also constrained to note that having received and accepted the broccoli, because this is a f.o.b. transaction, respondent had the burden to show that transportation conditions were normal. It did not do so. While, with respect to the transaction involving the 576 cartons of broccoli its failure to do so is not of particular concern because the broccoli arrived in one day and made good delivery, it is not of particular concern because the broccoli arrived in one day and made good delivery, it is of concern with respect to the 960 cartons of broccoli because it is well known that broccoli tends to yellow very quickly if temperatures ar not maintained near freezing. See "Protecting Perishable Foods During Transport by Truck," page 37, Agriculture Handbook No. 669, September 1987. Respondent provided no evidence to show why it took a day longer for the 960 cartons of broccoli to be transported in interstate commerce. Neither did it show what the temperatures were on board either of the trucks during the period of time in issue. Certainly, its of failure to provide information to complainant about the June 10, 1987, federal inspection in a timely fashion is very strong evidence of the fact that it had something to hide. It is badly prejudiced by this failure.

In view of the above, we have no alternative other than to find that complainant must prevail in this proceeding. Respondent has failed to pay complainant $8,043.20. Its failure to do so is a violation of section 2 of the Act for which reparation must be awarded with interest. Obviously, under the circumstances involved in this case, respondent may not claim damages. Therefore, the counterclaim must be dismissed.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $8,043.20, with interest thereon at the rate of 13% per annum from July 1, 1987, until paid.

The counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

TEX-SUN PRODUCE v. INTERNATIONAL PRODUCE DISTRIBUTORS, INC.
PACA Docket No. R-88-195.
Decision and Order issued September 18, 1989.

Consignments.

In a consignment transaction, the consignor chooses the consignee as its agent, derives the benefit of good performance and the risk of poor performance Market News Service reported prices are not a basis of reasonable returns. Thus, not a basis of reasonable returns Thus, consignor was not entitled to reparation.

George S. Whitten, Presiding Officer.
Rolando R. Ramirez, for Complainant.
Kevin D. Pagan, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $6,070.77 in connection with the shipment in interstate commerce of three lots of watermelons.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. Respondent also filed a counterclaim alleging that not less than $30,127.13 is due in connection with separate transactions involving the shipment by respondent to complainant of watermelons, garlic, and onions. Complainant filed a reply to the counterclaim denying any liability thereunder.

Although the amount claimed in the counterclaim exceeds $15,000.00, the parties waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Tex-Sun Produce, Inc., is a corporation whose address is P.O. box 704, Falfurrias, Texas. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, International Produce Distributors, Inc., is a corporation whose address is 6401 S. 36th Street, McAllen, Texas. At the time of the transactions involved herein respondent was licensed under the act.

3. On or about February 4, 1987, complainant sold to respondent and shipped from Falfurrias, Texas, to respondent in McAllen, Texas, 325 cartons (24,420 pounds) of size 4, Mexican Jubilee watermelons at $12.50 per hundred weight, or $3,052.50, f.o.b., and 125 cartons (8,768 pounds) of size 5, Mexican Jubilee watermelons at $11.50 per hundred weight, or $1,008.32, f.o.b. These watermelons were crossed from Mexico 12 to 18 days prior to the date of shipment. Such melons were accepted by respondent on February 4, 1987, at its place of business in McAllen, Texas, and were billed out by respondent to its customers in Chicago, Illinois and Milwaukee, Wisconsin, on the following day. Two hundred twenty five cartons of the melons were federally inspected at the place of business of one of respondent's customers, Tony Zingale Co., in Wisconsin on February 10, 1987, at 5:00 p.m., with the following results in relevant part:

> "LOT INSPECTION"
>
> . . .
>
> Products Inspected: Long striped WATERMELONS in cartons printed "Tex-Sun, Produce of Mexico, Tex-Sun Produce Inc." Applicant states 225 cartons.
>
> Condition of Load: Stacked in applicant's cooler.
>
> . . .
>
> Temperature of Product: In various locations 46° to 50° F.
>
> Size: Not determined.
>
> Quality: Mature, clean, well formed, rind characteristic color, flesh good red color. Grade defects average 1% consisting of scars.
>
> Grade: Meets quality requirements but fails to grade U.S. No. 1, only account condition.

4. On or about February 5, 1987, complainant sold to respondent, and hipped from Falfurrias, Texas to respondent in McAllen, Texas, 100 cartons 7,495 pounds) of size 4, Mexican Jubilee watermelons at $12.50 per ıundredweight, or $936,68, f.o.b. The melons were crossed from Mexico 11

to 17 days prior to date of shipment. Respondent accepted the melons on February 5, 1987, at its place of business in McAllen, Texas.

5. On or about February 7, 1987, complainant sold to respondent, and shipped from Falfurrias, Texas, to respondent in McAllen, Texas, 130 cartons (9,331 pounds) of size 4, Mexican Jubilee watermelons at $11.50 per hundredweight, or $1,073.07, f.o.b. Respondent accepted the watermelons on February 7, 1987, at its place of business in McAllen, Texas.

6. On or about the following dates, respondent consigned to complainant three lots of white onions in 50 lb. sacks (25 lb. for boilers) as follows:

Date	Lot No.	Jumbo	Lg./Med.	Pre Pack	Boilers	Total
12/27/86	344	54	358	274	7	693
12/27/86	343	28	233	392	160	813
01/07/87	0187	92	270	317	76	755

A commission was to be charged at 14% per sack for all onions sold at over $10.00 per sack and at 10% per sack for all under that price. In addition, a $.25 per sack handling charge was to be allowed. Complainant paid respondent a total of $12,738.20 in connection with the consignment of the onions. The evidence shows that complainant reconsigned 666 sacks of pre pack onions and 234 sacks of large medium onions, and reported net proceeds of $6.25 and $7.25 per sack respectively, or $5,851.75. The brokerage paid on reconsignment was not disclosed. Complainant deducted at 10% sales commission of $585.18 in connection with these reconsigned onions. Complainant reconsigned 164 sacks of boilers for reported net proceeds of $1,066.00, but failed to pass along the proceeds to respondent. As to 270 sacks of large medium onions, complainant deducted $.25 for brokerage fees apparently paid to an outside broker, or $67.50. As to 25 sacks of boilers, complainant deducted $.25 in brokerage fees apparently paid to an outside broker, or $6.25.

7. An informal complaint was filed on May 26, 1987, which was within nine months after the cause of action herein accrued. An informal counterclaim was filed between September 1, September 21, 1987, which was within nine months after the cause of action relative to the consignment of the onions covered by Finding of Fact 6 accrued.

Conclusions

Complainant seeks to recover the purchase price, totaling $6,070.77, applicable to three lots of watermelons sold to respondent in early February of 1987. Complainant submitted, along with its formal complaint, documentation showing the crossing of the melons from Mexico into Texas in order to demonstrate the presence of foreign commerce. Respondent asserts that such documentation shows that the melons were old at the time they were shipped to respondent. Although complainant attempted to rebut this defense by testimony that respondent had reserved the melons a number of days prior to shipment and only consented to shipment after being prodded by complainant, we do not deem it necessary to make a determination in regard to this contention. The Department's publication *The Commercial*

Storage of Fruits, Vegetables, and Florist and Nursery Stocks, Agricultur Handbook 66, indicates that watermelons, when held between 50°-60° Fahrenheit, should keep for two to three weeks or longer. There is no evidence in this record that the subject watermelons were over three weeks old at the time of the sale to respondent. All of the documentation in this record shows that the sale of the melons and the acceptance thereof took place between the parties in Southern Texas. The melons were rebilled out by respondent to respondent's ultimate customers on or about the day after the melons were shipped by complainant to respondent. We conclude that there was no warranty of suitable shipping condition applicable to these melons in regard to the ultimate destination of the melons. See *Rancho Vergeles, Inc. v. Richard Shelton, d/b/a Midvalley Brokerage Company*, 46 Agric. Dec. 1031 (1987). Indeed, there is no indication in this record tha complainant even knew of the ultimate destination of any of the melons. See *B & L Produce v. Florance Distributing Co.*, 37 Agric. Dec. 78 (1978) Consequently, the overmaturity and decay of a portion of the melons, a shown by the federal inspection on February 10, in Milwaukee, Wisconsin does not demonstrate that the melons were not in good condition at the tim of the sale between the parties herein. We conclude that respondent accepte the melons and is therefore liable to complainant for the full purchase pric thereof.

We have not failed to note respondent's contention, reiterated througho this proceeding, that the subject melons were rejected by responden However, there is no evidence to show the communication by respondent t complainant of any rejection in regard to the melons, much less a rejectio which would be considered timely in reference to the time when the sale too place. See *Beamon Brothers v. Cal. Sweet Potato Growers*, 38 Agric. Dec. 7 (1979); *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 86 (1979); and *G & S Produce Co. v. Niagara Frontier Services*, 38 Agric. Dec. 72 (1979).

Respondent filed a counterclaim in the amount of $30,127.13 in connectio with the sale by respondent to complainant of three loads of watermelons i March and April of 1986, 17 loads of garlic in May, June, and July of 198(and three loads of onions in December of 1986, and January of 1987. Ther is no timely complainant disclosed by this record in regard to the shipment of watermelons and garlic. However, when respondent replied to the informa complaint by letter dated September 1, 1987, it lodged with this Departmen what amounts to a timely informal complaint with regard to the onio transactions.

Respondent's contentions in regard to the onion transactions mainly cente around the allegation that complainant failed to realize the full market pric for the onions. In support of this contention, respondent has submitted copie of Market News Service reports for the applicable period together wit documentation showing the net proceeds reported and paid by complainant It must be remembered that in a consignment transaction the consignee act at all times as an agent of the consignor, and that title to the goods being sol remains in the consignor until such time as the agent effectuates sales of suc goods. The consignor chooses his agent and derives full benefit fro

exceptionally good performance and must also bear the consequences of poor performance. Absent fraud, or some other breach of the fiduciary contract between the consignor and the agent, there is no basis for us to award reparation. We have always refused to hold such agents to a standard measured by the prices shown by Market News Service reports. See *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420 (1972); *South Hampton Produce Distributors v. D. C. Flores & Co.*, 19 Agric. Dec. 1893 (1960); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); and *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956).

The evidence submitted by respondent with regard to the onion consignments does show a failure on complainant's part to remit the correct amounts to respondent. First, we note that complainant never sought to rebut any of the evidence submitted by respondent, but merely alleged the transactions were separate transactions which had nothing to do with those which were the subject of the complaint. Respondent's evidence shows that some of the onions were reconsigned by complainant. Reconsignment of consigned produce is not permitted without explicit permission of the consignor. There is no showing in this record that complainant had such permission. Consequently, the commissions charged by the parties to whom complainant reconsigned the produce must be disallowed. The evidence shows that a $.25 per sack brokerage fee was apparently paid to an outside broker in regard to 270 sacks of large medium onions and 25 sacks of boilers. The commissions thus paid, or $73.75, should be reimbursed to respondent. In addition, the record shows that complainant reconsigned 666 sacks of pre-pack onions and 234 sacks of large medium onions. The record does not disclose the commission charges attributable to such reconsignments. Consequently, we will award to respondent the commission charges applicable to such transactions charged by complainant, or $585.18. In regard to 164 sacks of boilers, complainant reported net proceeds of $1,066.00, but complainant's accounting sheets do not show that such amount, or any amount relevant to such onions, was passed along to respondent. The boilers were reconsigned, and we assume that the $1,066.00 is the net proceeds after deduction of brokerage attributable to the reconsignment. Consequently, we will not allow a commission. The total amount due to respondent on the consigned onions is $1,724.93. This amount should be set off against the $6,070.77 purchase price due from respondent to complainant on the three watermelon transactions. Respondent owes complainant a balance of $4,345.84. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim should be dismissed.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,345.84, with interest thereon at the rate of 13% per annum from March 1, 1987, until paid.

The counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

FRUIT BELT CANNING CO., INC. v. MICHIBAY FRUIT, INC.
PACA Docket No. 2-7481.
Decision and Order issued October 19, 1989.

Options - rescission; Cover- unreasonable delay - damages.

Where respondent, through a broker, granted complainant an option to buy cherries, such option irrevocable because broker's statement was a necessary writing under the Uniform Commercial Code. Complainant's delay in covering for respondent's breach by not buying cherries for two month's was too long. Thus, damages were awarded based on price of cherries at a the time of the breach.

Andrew Y. Stanton, Presiding Officer
Complainant, Pro se.
LeRoy W. Gudgeon, for Respondent.
Decision and Order issued by Donald A Campbell, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $21,682.50 in connection with an alleged option contract to purchase cherries from respondent, in contemplation of interstate commerce.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

As the amount claimed as damages exceeds $15,000.00, and an oral hearing was requested by respondent, such a hearing was held on October 20, 1987, in Traverse City, Michigan. In the course of the hearing, at which only respondent was represented by legal counsel, two witnesses testified on behalf of either party. Both parties filed briefs and claims for fees and expenses.

Findings of Fact

1. Complainant, Fruit Belt Canning Company, Inc., is a corporation whose address is Box 203, Paw Paw, Michigan.

2. Respondent Michibay Fruit, Inc., is a corporation whose address is Box 43, North Port, Michigan. At the time of the transaction involved herein, respondent was licensed under the act.

3. On approximately April 15, 1986, complainant's president, David Frank, initiated negotiations with Daniel Bixby, owner of Bixby Food Sales and Service Co., Lak Leelanau, Michigan, seeking to enter into an option to purchase a quantity of cherries. At that time, Mr. Bixby was acting both as a broker and as respondent's manager (Transcript (hereinafter, "Tr.") at 11-15, 97-101). It was Mr. Frank's impression that Mr. Bixby was acting as a broker, and not as an employee of respondent (Tr. at 77).

4. On Friday, April 18, 1986, Mr. Bixby met with Glen LaCross, president of respondent, and informed Mr. LaCross that complainant was interested in an option to purchase respondent's cherries at $.345 per pound. Mr. LaCross

gave Mr. Bixby, acting as a broker, permission to enter into the option with complainant (Tr. at 16).

6. On April 18, 1986, after his meeting with Mr. LaCross, Mr. Bixby spoke with Mr. Frank, and entered into a contract providing complainant with an option to purchase from respondent, in contemplation of eventual movement in interstate commerce, all or a portion of 6,500 30 pound tins of U.S. Grade A Red Sour cherries at a price of $.345 per pound, f.o.b. The option would remain open until 5:00 p.m. on May 1, 1986.

7. On April 18, 1986, Mr. Bixby prepared and signed a confirmation of sale which set forth the terms of the option. The confirmation contained the following printed statement: "THIS order subject to confirmation of seller, if incorrect advise immediately." That same day, April 18, 1986, Mr. Bixby mailed a copy of the confirmation of sale to complainant and placed a copy of the confirmation of sale on Mr. LaCross' desk (Tr. at 25, 40, 53-54).

8. On Saturday, April 19, 1986, at approximately 2:30 p.m., Mr. LaCross spoke to Mr. Bixby over the telephone concerning the option entered into with complainant (Tr. at 42-46, 106-107) and asked Mr. Bixby to attempt to cover that option by seeking another purchaser. Mr. LaCross did not indicate any desire to cancel the option granted to complainant.

9. Frost warnings were issued on April 21, 1986, (Tr. at 46, 111). Freeze conditions could result in an increase in the price of cherries (Tr. at 51, 113).

10. On April 21, 1986, Mr. LaCross informed Mr. Bixby that he wished to cancel respondent's option with complainant (Tr. at 46-47).

11. On April 22, 1986, Mr. Bixby notified Mr. Frank that respondent did not intend to honor the purchase option. Complainant then sent respondent the following letter, dated April 22, 1986:

> RE: Bixby Sales Confirmation # 1064 option to buy 6,500 tins of frozen grade A 1985 pack R.S.P. Cherries at 34 1/2 cents/Lb. until 5:00 p.m. 5/1/86.
>
> This is notify you that as of today 4/22/86 we are exercising our option to purchase the above 6,500 tins. We therefore request immediate transfer to our account with benefit of unexpired storage.
>
> Please acknowledge receipt of this letter by return mail.

12. After receiving complainant's April 22, 1986, letter, Mr. LaCross sent the following letter in response: "Please be notified that the option to buy 6500 30# tins of Montmorency Cherries 5+1 (1985 crop and pack), that I received from you on 4-24-86, is rejected because I did not approve of this option originally."

13. According to the records of Cherry Central Cooperative, Inc., Traverse City, Michigan, a large cherry dealer located near the places of business of complainant and respondent, the market price for Michigan 5+1 cherries in late April and early May 1986 was $.41 per pound on April 28, $.44 per pound on April 30, $.43 per pound on May 2, and $.43 per pound on May 5.

14. On May 21, 1986, complainant sent the following telegram to respondent, in relevant part: "Be advised that since you refuse to deliver the 6,500 tins of grade A R.S.P. cherries per our contract, we are going to purchase them on the open market and will hold you liable for the difference between the amount we paid and the amount of our contract with you."

15. Complainant purchased 1.250 30 pound tins of 5+1 cherries from The Program, Fogelsville, Pennsylvania, at $.52 per pound, or $19,500.00, on June 26, 1986, and 2,800 30 pound tins of 5+1 cherries from Cherry Central Cooperative, Inc., Traverse City, Michigan, at $.525 per pound, or $44,100.00, on June 27, 1986, for a total of 4,050 tins for $63,600.00.

16. Respondent has failed to pay complainant any part of the $21,682.50 which complainant claims to be due and owing.

17. A formal complaint was filed on August 8, 1986, which was within nine months from when the cause of action alleged herein accrued.

Conclusions

This proceeding involves an alleged option contract whereby complainant offered to purchase all or a portion of 6,500 30 pound tins of grade A cherries 5-1 from respondent at $.345 per pound, with such offer to remain in effect from the date of inception, allegedly April 18, 1986, until May 1, 1986, at 5:00 p.m. Complainant claims that respondent breached the contract by indicating its refusal to ship the cherries prior to the expiration of the option on May 1, 1986, and seeks damages based on the difference between the alleged contract price and the amount it paid for replacement cherries. Respondent denies having agreed to the alleged option contract and disputes complainant's claimed damages.

The first issue to be resolved is whether a contract came into being between the parties. Both parties agree that all contract negotiations were done through Daniel Bixby, owner of Bixby Food Sales and Service Co., Lake Leelanau, Michigan. At the time of the alleged contract, April 1986, Mr. Bixby was employed by respondent as its manager. Mr. Bixby asserted (Tr. at 11-15) that he acted as the broker in this transaction, and such assertion was confirmed by complainant's president, David Frank (Tr. at 77), and respondent's president, Glen LaCross (Tr. at 97-101). As Mr. Bixby was the broker, he is considered a disinterested third party, and his testimony is deserving of great weight.

Mr. Bixby and Mr. Frank agree that on approximately April 15, 1986, they discussed the possibility of complainant entering into an option contract to purchase cherries from respondent, with Mr. Bixby acting as the broker. Mr. Bixby testified that he discussed this on April 18, 1986, with Mr. LaCross, who told him "to basically do whatever was necessary to enter into participation with this option" (Tr. at 16). Mr. La Cross admitted discussing the possibility of accepting complainant's offer to purchase, but denied that he ever told Mr. Bixby to enter into the agreement (Tr. at 106-107). However, the testimony of Mr. Bixby is more credible than that of Mr. LaCross on this issue. Further, Mr. Bixby's testimony is supported by his April 18, 1986, confirmation of sale, containing the contract terms. Mr. Bixby stated that he put this confirmation

on Mr. LaCross' desk on April 18, 1986, (Tr. at 25, 40, 53-54). Mr. Bixby also testified that he discussed this contractual arrangement with Mr. LaCross on April 19, 1986, over the telephone, and Mr. LaCross did not repudiate it at that time (Tr. at 42-46). Respondent argues that the confirmation of sale states that it must be confirmed by the seller, and respondent never confirmed it. At the hearing, Mr. LaCross denied ever seeing the confirmation of sale until he received a copy of it attached to complainant's April 22, 1986, letter (Tr. at 125). Mr. LaCross also asserted that there was only a general discussion of the cherries on April 19, 1986, with no specific reference to the option contract supposedly in effect with complainant (Tr. at 107). While it is possible that Mr. LaCross never saw the confirmation of sale allegedly placed on his desk, we believe that Mr. LaCross confirmed respondent's acceptance of the option contract in his April 19, 1986, telephone discussion with Mr. Bixby. Although there is a direct conflict between the testimony of Mr. Bixby and that of Mr. LaCross regarding what was discussed in their April 19, 1986, telephone conversation, we must give greater weight to the testimony of Mr. Bixby. We, therefore, find that the parties agreed to the option contract.

Their remains the question of the legal validity of the option contract at issue. It is essentially an offer to purchase some or all of respondent's 6,500 tins, with such offer to remain subject to acceptance until 5:00 p.m. on May 1, 1986. As there was no consideration given by complainant, its offer was revocable at will by either party, unless such offer was rendered irrevocable at will by either party, unless such offer was rendered irrevocable by the occurrence of certain factors. The law governing this issue is found in section 2-205 of the Uniform Commercial Code, which states as follows:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms give assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

The option contract entered into by the parties herein met the requirements for an irrevocable offer, as set forth in section 2-205 above. The only questionable factor is whether the option contract included a signed writing. The confirmation of sale issued by Mr. Bixby on April 18, 1986, met this standard, as it contains the contract terms and is signed by the broker, representing both parties. See 1 *Williston on Sales* § 7-4 at 266.

Respondent clearly breached the option contact when Mr. LaCross notified Mr. Bixby on April 21, 1986, that respondent had no intention of complying. According to section 2-711 of the Uniform Commercial Code, complainant's remedies at that point were either to cover by purchasing substitute goods, or recover damages for non-delivery as provided in section 2-713 of the Code. Complainant claims that it covered by purchasing 1,250 30 pound tins of 5+1 cherries from The Program, Fogelsville, Pennsylvania, at $.52 per pound, or $19,500.00, on June 26, 1986, and 2,800 30 pound tins of 5+1 cherries from

Cherry Central Cooperative, Inc., Traverse City, Michigan, at $.525 per pound, or $44,100.00, on June 27, 1986, for a total of 4,050 tins for $63,600.00. Respondent claims that these purchases were untimely, and we agree, as cover purchases must be made without reasonable delay (*All Foods, Inc. v. Richard A. Shaw, Inc.*, 40 Agric. Dec. 1574 (1981)), and complainant's purchases took place more than two months after the contract was breached. We will instead award damages for non-delivery.

Section 2-713 of Uniform Commercial Code provides as follows, in relevant part:

> the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages . . . but less expenses saved in consequence of the seller's breach.

There are no relevant Market News Service Reports listings of which we may take judicial notice to determine the market price of the cherries on April 21, 1986, when respondent breached the contract. However, respondent has presented evidence through a witness, James Giannestras, vice president of marketing and sales of Cherry Central Cooperative, Inc., Traverse City, Michigan, a large cherry dealer, that the market price for Michigan 5+1 cherries in late April and early May 1986 was $.41 per pound on April 28, $.44 per pound on April 30, $.43 per pound on May 2, and $.43 per pound on May 5. We find the prevailing market price at the time the contract was breached to have been $.41 per pound. Complainant has claimed that it purchased 4,050 tins, or 121,500 pounds, which is apparently all the cherries it would have purchased from respondent had respondent complied with the option contract (which called for the purchase of a *maximum* of 6,500 tins). Therefore, the market price, at the time of the breach, was $.41 per pound, or $49,815.00 for the 121,500 pounds of cherries which complainant would have purchased. The contract price for such cherries was $.345 per pound, or $41,917.50 for the 121,500 pounds of cherries. The difference between the market price of $49,815.00 and the contract price of $41,917.50 is $7,897.50. As there has been no proof of any incidental or consequential damages, or expenses saved due to respondent's breach, we find complainant's total damages to be $7,897.50. Respondent's failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

As complainant is the prevailing party, it is entitled to an award of reasonable fees and expenses incurred in connection with the oral hearing (7 C.F.R. § 47.19(d)). Complainant has claimed $921.00, to which respondent has not objected. However, such claim cannot be awarded in full, as it includes $560.00 for fees for an attorney or representative. As complainant represented itself, its claim for $560.00 must be disallowed. Complainant's claim for expenses will be permitted. Complainant has claimed subsistence for one person for one day and mileage of 300 miles. At the time of the hearing, the subsistence rate was $30.00 per day and mileage was $.225 per mile. Therefore, complainant's claim for expenses will be granted in the

amount of $30.00 plus $67.50, or $97.50. Complainant has also asserted $285.00 for the costs of the hearing transcript, which is valid, for a total award for fees and expenses of $382.50.

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $7,897.50, with interest thereon at the rate of 13 percent per annum from June 1, 1986, until paid.

Within 30 days from the date of this order, respondent shall pay to complainant, as additional reparation for fees and expenses, $382.50, with interest thereon at the rate of 13 percent per annum from the date of this Order, until paid.

Copies of this order shall be served upon the parties.

MORGAN OF WASHINGTON, INC., d/b/a DOUBLE DIAMOND FRUIT. v. MORT BRAMSON.
PACA Docket No. R-89-66.
Order issued October 31, 1989.

Jurisdiction - Appeal.

When a Petition to Reconsider is filed more than 30 days after the date of entry of the Decision, the Secretary lacks jurisdiction to consider the subject matter.

Dennis Becker, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Order issued by Donald A. Campbell, Judicial Officer.

A Decision and Order was issued in this proceeding on September 5, 1989, in which reparation with interest was awarded to complainant in the amount of $2,910.00. On October 11, 1989, respondent filed a Petition for Rehearing and/or Reconsideration. In its Petition respondent averred that it received the Decision and Order on September 18, 1989. Pursuant to 7 C.F.R. § 47.24 a petition for rehearing or reconsideration must be filed within 10 days of the date a party received the Decision and Order of the Secretary. Therefore, the Petitioner's filing was not timely filed, and should not be granted.

In any event, the Secretary cannot consider the Petition because it was filed more than 30 days after the date of the Decision and Order. When 30 days have elapsed after the issuance of a Decision without further action, the Secretary loses jurisdiction of the subject matter, and cannot take any further action with respect thereto, since pursuant to 7 U.S.C. § 499g(c) a party has 30 days from the date of the Decision and Order to appeal to a United States District Court, and the jurisdiction of the Secretary cannot run longer than does the right of appeal to the District Court.

In view of the above, the Petition is denied for lack of jurisdiction.

OREGON ONIONS, INC. v. PAIUTE FROZEN FOODS CORP.
PACA Docket No. R-89-330.
Order of Dismissal issued December 1, 1989.

Jurisdiction - Agreements to Pay.

Where complainant and respondent agreed after a timely reparation complaint was filed that respondent owed the money to complainant, and the parties agreed to payment terms, this forum declined to take jurisdiction because there is no contract dispute involving produce.

Dennis Becker, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se
Order issued by Donald A Campbell, Judicial Officer.

Complainant was notified by a letter from this forum dated October 10, 1989, that the complaint in this proceeding may be dismissed because it had entered into an agreement with the respondent under which respondent was to pay it an agreed upon amount plus interest pursuant to a Note signed by both parties. Complainant was given an opportunity to show cause why the complaint should not be dismissed.

On October 26, 1989, complainant filed its justification for not dismissing this proceeding. It gave as its only reason the fact that respondent is allegedly in arrears in making payments in accordance with the aforementioned Agreement, and that by continuing this proceeding leverage may be brought to bear to force respondent to meet its obligation under the Agreement.

Reparation proceedings exist to resolve disputes between members of the produce industry which involve perishable agricultural commodities. No such dispute exists. When both parties signed the note any possible dispute as to the indebtedness of respondent with respect to produce was resolved. What has not been resolved is the failure of respondent to pay complainant in accordance with the parties' subsequent agreement. This is not the forum for a resolution of respondent's failure to meet its promise to pay. Complainant has other forums in which to sue on the Note. This forum will not take jurisdiction over a matter which does not directly involve a dispute between two parties concerning produce. See *E. J. Harrison & Son v. A. E. Albert & Sons, Inc.*, 24 Agric. Dec. 884 (1965); *Reid & Joyce Packing Co. v. G. W. Touchstone*, 15 Agric. Dec. 884 (1956). Therefore, the complaint in this proceeding must be dismissed.

Order

The complaint is dismissed.

Copies of this Order shall be served on the parties.

MISCELLANEOUS ORDERS

In re: CHARLES CROOK WHOLESALE PRODUCE AND GROCERY CO., a/t/a CROOK PRODUCE CO.
PACA Docket No. D-88-506.
Order Dismissing Untimely Petition for Reconsideration filed August 3, 1989.

Procedure - Timeliness - Jurisdiction.

The Judicial Officer on August 3, 1989 (3 pages), dismissed an untimely petition for reconsideration. The rules of practice provide no relief to a respondent who timely delivered a petition for reconsideration to a courier, who lost the petition. Furthermore, the Judicial Officer has no jurisdiction to take any action in a case after the original decision and order become final (on the 35th day after service on the respondent). In any event, if the petition had been timely filed, it would have been denied for the reasons set forth in the original decision.

Sharlene Lassiter, for Complainant.
James R. Sheatsley, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

On June 9, 1989, respondent filed a Petition to Reconsider the Decision and Order issued by the Judicial Officer on January 27, 1989. An Amended Petition for Reconsideration was filed June 15, 1989. Since the Petition for Reconsideration was not filed within 10 days after the date of service of the decision, it must be dismissed (7 C.F.R. § 1.146(a)(3)). Respondent argues that it delivered a Petition for Reconsideration to a courier, which should have been delivered within the 10-day time limit, but that the courier lost the petition. However, the rules of practice provide no relief in such circumstances.[1] Respondent could have ascertained by a telephone call that the document had not been filed, and obtained an extension of time by a telephone request.

Furthermore, the Judicial Officer's January 27, 1989, Decision and Order became final on the 35th day after service thereof on the respondent, and the Judicial Officer lost jurisdiction to take any further action in the case. As stated in *In re Moore Marketing International, Inc.*, 47 Agric. Dec. ____, slip op. at 5 (Sept. 8, 1988), relating to loss of jurisdiction where there is a late appeal:

> Where an appeal from an ALJ's decision is filed after it has become final (i.e., on the 35th day after service), it has routinely been held by the Judicial Officer that he has no jurisdiction to consider an appeal

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[1]By way of analogy, I have just received a copy of a letter from the Deputy Clerk/Opinions, United States Court of Appeals for the Eighth Circuit, stating: "Petitions for rehearing *must* be received by the Clerk's office within the time set by FRAP 40 (within 14 days of entry of judgment) unless extended by court order. Petitions for rehearing are not afforded any grace period for mailing and are subject to being denied if not timely received."

filed after the decision has become final.[3] The same holding is required where an ALJ's decision has become "final" because it is a consent decision. Accordingly, respondent's appeal must be dismissed.

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[3]*In re Hamilton*, 45 Agric. Dec. 2395, 2395 (1986) (order denying late appeal) (appeal filed on same day order became final is not timely); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131, 1131 (1986); *In re Powell*, 44 Agric. Dec. 1220, 1220-23 (1985); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1234-37 (1985) (order denying reconsideration); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1107-10 (1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits (erroneously I believe) notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950, 1950-52 (1983) (order denying late appeal); *In re Veg-Pro Distribs.*, 42 Agric. Dec. 1173, 1174 (1983) (order denying late appeal); *In re Dick*, 42 Agric. Dec. 784, 785 (1983) (after order is final, respondent cannot obtain appeal by labeling document motion for relief from stipulation); *In re Petro*, 42 Agric. Dec. 921 (1983) (order dismissing appeal); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427, 427-28 (1983) (order dismissing appeal; appeal filed on same day order became final was not timely); *In re Brink*, 41 Agric. Dec. 2146 (1982) (order dismissing appeal), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Mass., Inc.*, 38 Agric. Dec. 379 (1978) (order denying late appeal); *In re Cook*, 39 Agric. Dec. 116 (1978) (order dismissing appeal).

In any event, however, if the petition had been timely filed, it would have been denied for the reasons set forth in the original Decision and Order.

In re: CHARLES CROOK WHOLESALE PRODUCE AND GROCERY CO.
d/t/a CROOK PRODUCE CO.
PACA Docket No. D-88-506.
Order Denying Stay Order filed August 17, 1989.

Jurisdiction.

Charlene Lassiter, for Complainant.
James R. Sheatsley, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

Respondent has requested a stay pending review by the United States Court of Appeals for the Fourth Circuit of the order filed August 3, 1989 dismissing respondent's untimely petition for reconsideration. As stated in my August 3, 1989, order, it is my view that I lost jurisdiction in this case long

before the petition for reconsideration was filed. It is my further view that the Court of Appeals has no jurisdiction because of the 60-day time limit for filing an appeal to the Court of Appeals. 28 U.S.C. § 2344. That 60-day time limit is jurisdictional. *Illinois Central Gulf Railroad Company v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983). In view of my belief as to respondent's lack of jurisdiction to seek judicial review at this time, I do not believe that an administrative stay order should be issued.

In re: VEG-MIX, INC.
PACA Docket No. 2-6612.
Order Lifting Stay Order filed August 7, 1989.

Edward Silverstein, for Complainant.
John M. Himmelberg, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

The order previously issued in this case on August 21, 1985, *In re Veg-Mix, Inc.* 44 Agric. Dec. 1583 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), was stayed pending proceedings for judicial review. Following the remand from the Court of Appeals, Chief Administrative Law Judge Victor W. Palmer issued an initial Decision and Order on May 19, 1989, in which he found and concluded that Veg-Mix's violations reached both repeated and flagrant levels before Mr. Harris ceased to be responsibly connected with the firm. No appeal has been filed with the Judicial Officer. Accordingly, the stay order is hereby lifted, and the order previously issued on August 21, 1985, shall become effective on September 15, 1989.

In re: CHERRY HILL PROCESSING, INC.
PACA Docket No. D-89-506.
Decision and Order filed May 15, 1989.

Admission of all material allegations in complaint - Failure to pay promptly.

Allan R Kahan, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on January 18, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1987 through January 1988, the respondent purchased, received, and accepted, in interstate and foreign commerce, from 53 sellers, 106 lots of apples, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $238,803.79.

A copy of the complaint was served upon respondent. Respondent filed an answer on February 13, 1989, in which it admitted all the allegations of the complaint, and claimed full payments have been made to some of the sellers and partial payments have been made to other sellers. Respondent claimed that it had paid approximately 30% of the amounts due. Upon the motion of the complainant for the issuance of an Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Cherry Hill Processing, Inc., is a corporation whose address is 750 Canada Road, Bailey, Michigan 49303.

2. Pursuant to the licensing provisions of the Act, license number 872001 was issued to respondent on September 28, 1987. This license terminated on September 28, 1988, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee..

3. As more fully set forth in paragraph 5 of the complaint, during the period october 1987 through January 1988, respondent purchased, received and accepted in interstate and foreign commerce, from 53 sellers, 106 of apples, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $238,803.79.

Conclusions

Respondent's failure to make full payment promptly with respect to the 106 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under this Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.135 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 7, 1989.-Editor]

In re: DAMON'S PRODUCE, INC.
PACA Docket No. D-88-530.
Decision and Order filed May 15, 1989.

Failure to pay promptly - Admission of material allegations in complaint - Official notice of bankruptcy proceedings.

Respondent's failure to make full payment promptly for perishable agricultural commodities it purchased found to be willful, flagrant and repeated violations of the PACA. Official notice was taken of respondent's admissions in a bankruptcy proceeding.

Allan R. Kahan, for Complainant.
Howard R. Heralson, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*; hereinafter referred to as the "Act"), instituted by a complaint filed on May 4, 1988, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period August 1986 through June 1987, respondent, a corporation licensed under the PACA and located in Oklahoma City, Oklahoma, failed to make full payment promptly to 22 sellers of the agreed purchase prices, or balances thereof, in the total amount of $127,182.70 for 65 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. All but one of the

alleged to be located in states other than Oklahoma. A copy of the complaint was served upon respondent. Respondent filed an answer in which it admitted the jurisdictional allegations but neither admitted nor denied the material allegations in the complaint.

However, the pleadings in this proceeding show that respondent had filed a voluntary petition in bankruptcy on June 8, 1987, in which it admitted owing $123,151.60 to 19 of the 22 sellers referred to in the complaint (Case No. 87-04318A, U.S. Bktcy. Ct., W.D. Okla.). In an affidavit , James R. Frazier, Assistant Chief, PACA Branch, Fruit and Vegetable Division, stated that the bankruptcy petition showed that the amount owed by respondent to the 17 sellers was the same amount as the complaint alleged that he owed to these sellers.

On February 8, 1989, complainant filed a motion to assign a hearing date in this matter, but on March 22, 1989, filed a motion to withdraw its motion for a hearing and to issue a decision based on respondent's admissions in its bankruptcy petition. Complainant argued, *inter alia*, that official notice should be taken of the bankruptcy proceeding and that a decision should be issued finding that respondent engaged in willful, repeated, and flagrant violations of the Act.

On April 10, 1989, respondent filed objections to complainant's motion. In its objections, respondent admitted that it had committed repeated violations of the Act, but denied that the violations were willful or flagrant. It contended that either a decision be issued finding that it had engaged in repeated, but not willful or flagrant violations, or, in the alternative, that a hearing be set in this matter.

Discussion

Official notice is taken of respondent's bankruptcy proceeding and the admissions therein. *Walter Gaily & Sons, Inc.*, 45 Agric. Dec. 729 (1986). In view of respondent's admissions in the bankruptcy proceeding, and its admissions in its objections, it is found that respondent engaged in repeated violations of the Act. As there are no material facts in dispute in this regard, a hearing is not necessary. *Walter Gailey & Sons, Inc., supra.*

The remaining issue is whether respondent's violations were wilful and/or lagrant. In PACA disciplinary proceedings, "an action is wilful if a prohibited ict is done intentionally, irrespective of evil intent, or done with careless lisregard of statutory requirements." *B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021 1985); *H.M. Shield, Inc.*, __Agric. Dec.__ (PACA Docket No. 2-7660, /16/89). As respondent has admitted that it did engaged in conduct in olation of the Act, its conduct was intentional or, if not intentional, its lmittedly repeated violations were certainly in careless disregard of the Act. ccordingly, respondent's violations are found to be willful.

Finally, respondent's violations are also found to be flagrant because of the ell-settled precedent that "a failure to make full payment (exceeding a *de ninimis* amount), because of circumstances peculiar to an individual espondent, is *always* considered as flagrant and repeated" (emphasis added).

[redacted]

Joe Phillips & Associates, Inc., ___ Agric. Dec. ___ (PACA Docket No. D-88-545, 4/21/89).

The amount of payment involved here (over $100,000) far exceeds a *de minimis* amount. Respondent is therefore found to have engaged in repeated, flagrant and wilful violations of the Act.

Findings of Fact

1. Respondent, Damon's Produce, Inc., is an Oklahoma corporation, whose business address is 301 South Ellison, Oklahoma City, Oklahoma 73108. (Complaint, ¶ 2)

2. Pursuant to the licensing provisions of the PACA, license number 701565 was issued to respondent on May 15, 1970. This license was renewed annually and is next subject to renewal on or before May 15, 1988. (Complaint, ¶ 3)

3. The Secretary has jurisdiction over respondent and the subject matter involved herein.[1]

4. During the period August 1986 through June 1987, respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices, or balances thereof, in the total amount of $123,151.60 for perishable agricultural commodities purchased, received and accepted in interstate commerce.

Conclusions

Respondent has committed wilful, flagrant, and repeated violations of Section 2 of the PACA (7 U.S.C. § 499b), by failing to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 4 above, for which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall become final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service.

[This Decision and Order became final July 10, 1989.-Editor]

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[1]This finding is based on respondent's admission that the Secretary has jurisdiction in this matter. It is also based on respondent's admission in the bankruptcy proceeding that the sellers involved were located in states other than Oklahoma. It is therefore inferred that the commodities shipped to respondent were in interstate commerce.

In re: L. R. MORRIS PRODUCE EXCHANGE, INC. and THOMAS R. MORRIS.
PACA Docket No. D-88-550.
Decision and Order filed June 21, 1989.

Admission of material allegations in complaint - Failure to pay promptly - Failure to maintain sufficient assets in trust.

Sharlene Lassiter, for Complainant
George E Lewis, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. The Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture instituted this proceeding by filing a complaint on September 30, 1988. The complaint alleges that 1) during the period May 14, 1987, through December 31, 1987, respondent purchased, received and accepted 260 lots of fruits and vegetables, being perishable agricultural commodities, from 45 sellers but ailed to make full payment of the agreed upon purchase prices or balances ereof in the total amount of $553,212.52; and 2) that respondent L. R. lorris Exchange, Inc., under the direction, management and control of espondent Thomas Morris failed to maintain sufficient assets in trust to pay ne unpaid transactions as required by section 5(c) of the Act, (7 U.S.C. § 499e(c)). The complaint also alleged that the acts of respondent L. R. Morris Exchange, Inc., under the direction, management and control of respondent Thomas Morris in failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities purchased and its failure to maintain the trust, as alleged in paragraph 5 and 6 of the complaint, constitute willful, flagrant and repeated violations of section 2 of the Act.

A copy of the complaint was served upon respondents on October 6 and 8, 1988, respectively. Respondents filed a joint answer in which they admitted the material allegations of the complaint. Consequently, complainant filed a motion for the issuance of a decision. Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. L. R. Morris Produce Exchange, Inc., hereinafter referred to as the respondent, L. R. Morris, is a corporation whose mailing address is P.O. Box 1491, Columbia, South Carolina 29202.

2. Thomas R. Morris, hereinafter referred to as the respondent, T. R. Morris, is an individual whose mailing address is 1829 Senate Street, Unit 88C, Columbia, South Carolina 29201. Respondent T. R. Morris is the *alter ego* of the respondent L. R. Morris.

3. Pursuant to the licensing provisions of the PACA, license number 720400 was issued to respondent L. R. Morris on September 10, 1971. This

license has been renewed annually and next is subject to renewal on or before September 10, 1989.

4. As more fully set forth in paragraph five of the complaint, during the period May 1987 through December 1987, respondent L. R. Morris under the direction, management and control of respondent T. R. Morris, failed to make full payment promptly to 45 sellers of the agreed purchase prices, or balances thereof, in the total amount of $553,212.52.

5. As of April 15, 1988, respondent L. R. Morris, under the direction, management and control of respondent T. R. Morris, had yet to pay $355,357.03 of the total agreed purchase prices set forth in Finding of Fact No. 4 above.

6. Respondent L. R. Morris, under the direction, management and control of respondent T. R. Morris, did not maintain sufficient funds in trust to pay the sellers of produce as required by section 5(c) of the Act. (7 U.S.C. § 499e(c))

Conclusions

Respondent L. R. Morris' failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b) for which the Order below is issued.

Order

The license of respondent L. R. Morris Produce Exchange, Inc. is herel revoked.

The Order shall take effect on the 11th day after this decision becom final.

Pursuant to the Rules of Practice governing proceedings under the Ac this decision will become final without further proceedings 35 days afte service, unless appealed to the Secretary by a party to the proceeding withi 30 days of service as provided in sections 1.139 and 1.145 of the Rules o Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 3, 1989.-Editor]

In re: BOZZELLI FARMS, INC.
PACA Docket No. D-88-541.
Decision and Order filed May 1, 1989.

Failure to pay promptly - Failure to file answer.

Allan R. Kahan, for Complainant.
Respondent, Pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on August 12, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1986 through January, 1987, respondent while acting as an agent for one shipper, Silva Harvesting, Inc., Gonzales, California, received and accepted, in interstate commerce, seven lots of vegetables, all being perishable agricultural commodities, sold them and collected the proceeds therefrom, but failed to make full payment promptly of the net proceeds realized, in the total amount of $2,030.69. In addition, it is further alleged in the complaint that during the period October 1986 through November 1987, respondent purchased 31 lots of perishable agricultural commodities from seven sellers, which it received and accepted in interstate and foreign commerce, and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $172,714.55.

A copy of the complaint was served upon respondent which respondent has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Bozzelli Farms, Inc., is a corporation, whose address is 3300 South Galloway Street, Unit #112, Philadelphia, Pennsylvania 19148.

2. Pursuant to the licensing provisions of the Act, license number 861437 was issued to respondent on June 19, 1986, presently is in effect, and is next subject to renewal on or before June 19, 1989.

3. As more fully set forth in paragraph 5 of the complaint, during the period November 1986 through January 1987, respondent, while acting as an agent for Silva Harvesting, Inc., Gonzales, California, received and accepted on consignment seven (7) lots of vegetables, all being perishable agricultural commodities, sold them and collected the proceeds therefrom, but failed to make full payment promptly of the net proceeds realized, in the total amount of $2,030.69.

4. As more fully set forth in paragraph 6 of the complaint, during the period October 1986 through November 1987, respondent purchased, received and accepted, from seven sellers 31 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices, or balance thereof, in the total amount of $172,714.55.

Conclusions

Respondent's failure to make full payment promptly of the net proceeds on the seven lots of vegetables as set forth in Finding of Fact No. 3, above, and failure to make full payment promptly of the agreed purchase prices, or balances thereof, or the thirty-one lots of perishable agricultural commodities as set forth in Finding of Fact No. 4, above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days afte service hereof, unless appealed to the Secretary by a party to the proceedin within thirty days after service as provided in sections 1.139 and 1.145 of th Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 24, 1989.-Editor]

In re: CERNIGLIA PRODUCE CO., INC.
PACA Docket No. D-89-517.
Decision and Order filed August 16, 1989.

Failure to pay promptly - Failure to file answer.

Edward M. Silverstein, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultur Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinaft referred to as the "Act", instituted by a complaint filed on March 17, 1989, t the Acting Director, Fruit and Vegetable Division, Agricultural Marketir Service, United States Department of Agriculture. It is alleged in th complaint that during the period October 1987 through December 198,

respondent purchased, received and accepted, in interstate commerce, from 36 sellers, 256 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make fully payment promptly of the agreed purchase prices or balances thereof in the total amount of $580,535.05.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Cerniglia Produce Company, Inc., is a corporation, whose mailing address is State Farmers Market, Forest Park, Georgia 30050.

2. Pursuant to the licensing provisions of the Act, license number 761908 was issued to respondent on July 19, 1976, was renewed annually, presently is in effect, and is next subject to renewal on or before July 19, 1989.

3. As more fully set forth in paragraph 5 of the complaint, during the period October 1987 through December 1988 respondent purchased, received and accepted in interstate commerce, from 36 sellers, 256 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $580,535.05.

Conclusions

Respondent's failure to make full payment promptly with respect to the 256 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the order below is issued.

Order

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 25, 1989.-Editor]

In re: SPADA DISTRIBUTING CO., INC.
PACA Docket No. D-89-535.
Decision and Order filed September 8, 1989.

Failure to pay promptly - Admission of material allegations in complaint.

Andrew Y. Stanton, for Complainant.
Mark McClanahan, for Respondent.
Decision and Order issued by Paul Kane, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.A. §§ 499a-s) (West 1980 and Supp. 1989) (hereinafter "PACA"), instituted by a complaint filed on June 20, 1989, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that during March and April of 1987, respondent purchased from four sellers, in interstate commerce, or in contemplation of sales in interstate and foreign commerce, 17 lots of perishable agricultural commodities but failed to make full payment promptly of the agreed purchase prices, in the amount of $129,897.75. Complainant further alleged that such actions were willful, flagrant and repeated violations of the PACA, and requested that a finding be made that respondent had committed willful, repeated and flagrant violations, and that the facts and circumstances of the violations be published.

On July 12, 1989, respondent by its president, Mr. George Spada, filed an answer averring that the corporate name of respondent has been changed to Spring Vegetable Corp., with an address at P.O. Box 150001, Portland, Oregon 97215, and admitted the essential allegations of the complaint, including its failure to pay $119,897.75 of the $129,897.75 set forth in paragraph 5 of the complaint as the amount allegedly owed to four sellers for the purchase of 17 lots of produce. Respondent specifically denied that it had committed "willful and flagrant violations." On July 21, 1989, complainant's counsel filed a Motion for Decision on the Pleadings, requesting that since respondent has admitted violations of the PACA, the Administrative Law Judge could issue, without hearing, a finding to that effect, and could order publication of that conclusion. Respondent's counsel was granted an extension of time within which a reply to complaint counsel's motion of July 21, 1989, could have been filed. However, such a reply has not been received. Therefore, the following findings and conclusion are made and reached, and the requested order is entered.

Findings of Fact

1. Respondent, Spada Distributing Co., Inc., is a corporation whos address is 1137 S.E. Union Avenue, Portland,Oregon 97214-3474. This corporation is now named the Spring Vegetable Corp. with a mailing address of P.O. Box 150001, Portland, Oregon 97215.

2. Pursuant to the licensing provisions of the PACA, license number 202027 was issued to respondent on September 12, 1963. This license had

been renewed annually, but terminated on September 12, 1988, pursuant to section 4(a) of the PACA (7 U.S.C.A. § 499d(a)) when respondent failed to pay the required annual license renewal fee.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in the complaint filed June 20, 1989, and respondent's answer, filed July 12, 1989, during March 1987 and April 1987, respondent purchased from four sellers 17 lots of perishable agricultural commodities, in interstate commerce, or in contemplation of sales in interstate and foreign commerce, but has failed to make full payment in the amount of $119,897.75 for such purchases.

Conclusions

Respondent has admitted its failure to make full payment for purchases of produce in the amount of $119,897.75. This admission, pursuant to the Department's Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary at 7 C.F.R. § 1.139 (1988) constitutes a waiver of respondent's right to a hearing before an Administrative Law Judge. It also permits the entry of legal conclusions based upon the specific facts. Accordingly, respondent is found to have violated PACA at 7 U.S.C.A § 499b. Further, while respondent has denied that its failure to pay its suppliers was flagrant or repeated, the precedent of case law, *B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021, 2028-2033 requires the conclusion that respondent's failure to pay these large debts to its suppliers was indeed both flagrant and repeated. It is not necessary to evaluate the willful character of respondent's violation of PACA, as the proceeding was not instituted in order to strip respondent of any license. *The Caito Produce Co.*, 48 Agric. Dec. ___, PACA Docket No. 88-511, June 1, 1989. Accordingly, pursuant to the Act at 7 U.S.C.A. § 499h(a), the facts of respondent's violation are published as follows:

Order

A finding is made that respondent has violated the PACA at 7 U.S.C.A. § 499b, and that such violation was flagrant and repeated.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision shall become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceedings within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the following:

Spada Distributing Co., Inc.
1137 S.E. Union Avenue
Portland, Oregon 97214-3474

Spring Vegetable Corp.
P.O. Box 150001
Portland, Oregon 97215

Mark McClanahan, Esq.
Counsel to Spring Vegetable Corp.
111 S.W. 5th Avenue, Suite 3500
Portland, Oregon 97204

Andrew Y. Stanton, Esq.
Office of the General Counsel
U.S. Dept. of Agriculture
Washington, D.C. 20250

[This Decision and Order became final October 20, 1989.-Editor]

In re: G & T PRODUCE CO., INC.
PACA Docket No. D-89-504.
Decision and Order filed August 16, 1989.

Failure to pay promptly - Failure to file answer.

Andrew Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on December 22, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1987 through January 1988, respondent purchased, received, and accepted, in interstate and foreign commerce, from eight sellers, 234 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $208,502.36.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, G & T Produce Company, Inc., is a corporation, whose address is 4566 Eisenhower Avenue, Alexandria, Virginia 22304.

2. Pursuant to the licensing provisions of the Act, license number 800387 was issued to respondent on January 14, 1980. This license was renewed annually, but terminated on January 14, 1988, pursuant to section 4(a) of the

Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period January 1987 through January 1988, respondent purchased, received, and accepted in interstate and foreign commerce, from eight sellers, 234 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $208,502.36.

Conclusions

Respondent's failure to make full payment promptly with respect to the 234 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final October 24, 1989.-Editor]

In re: BOBBY G. LEDFORD, d/b/a FRESCO PRODUCE CO.
PACA Docket No. D-89-514.
Decision and Order filed October 5, 1989.

Failure to pay promptly - Admission of material allegations in complaint.

Edward M. Silverstein, for Complainant.
Steve Udell, for Respondent.
Decision and Order issued by Paul Kane, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on February 17, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service,

United States Department of Agriculture. It is alleged in the complaint that during the period March 1987 through March 1988, respondent purchased, received and accepted, in interstate and foreign commerce, from 13 sellers, 178 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $109,174.66.

A copy of the complaint was served upon respondent. Respondent, through counsel, filed an answer admitting that it failed to pay for produce as alleged in the complaint.[1] He does allege that he is a debtor in bankruptcy, and that "all actions directly or indirectly for the purpose of collecting a debt are stayed" by virtue of 11 U.S.C. § 362. In doing so, respondent fails to understand that the intent of this action is to affect respondent's license status under the Act, and not to collect a debt. Indeed, even were respondent to make full payment for all of his produce purchases at this time, his multiple and flagrant failures to pay could result in the revocation of his license. Moreover, the filing of a petition in bankruptcy does not serve to delay or impede the Secretary from bringing disciplinary action under the Act. *See* 11 U.S.C. § 525. Also *see Melvin Beene Produce v. Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984), and *In re Fresh Approach, Inc.*, 49 B.R. 494 (Bkrtcy N.D. Tex. 1985). Therefore, upon the motion of the complainant for the issuance of an order without further procedure, which motion was not opposed by respondent, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).[2]

Findings of Fact

1. Respondent, Bobby G. Ledford, is an individual doing business as Fresco Produce Company, whose mailing address is 5223 Indigo, Houston, Texas 77035.[3]
2. Pursuant to the licensing provisions of the Act, license number 741179 was issued to respondent on February 6, 1974, but terminated on February 6,

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[1]Respondent, also, denied that he "lacked reasonable or good cause for the failure to pay." It is noted that there was no allegation in the complaint that he lacked such cause. Moreover, it is further noted that the Department's policy, as affirmed by the courts, is that virtually no excuses are acceptable as a replacement for timely payments for produce. *See e.g, Finer Foods Sales Co., Inc.*, 41 Agric. Dec. 1154, 1171 (1982), *aff'd sub nom, Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983).

[2]At the time the complaint herein was filed, the respondent's license was still acti Consequently, complainant sought revocation of it. In filing its motion for a decision subsequ to the automatic termination of respondent's license, *see* Finding of Fact 2, below, complain recommended, as sanction for his violations of the Act, that the Secretary publish a finding tha respondent committed willful, flagrant and repeated violations of it, rather than order revocatio of the license.

[3]The mailing address of Fresco Produce Company is 3121 1/2 Produce Row, Houston, Texas 77023.

1989, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual renewal fee.[4]

3. As more fully set forth in paragraph 5 of the complaint, during the period March 1987 through March 1988, respondent purchased, received and accepted in interstate and foreign commerce, from 13 sellers, 178 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $109,174.66.

Conclusions

Respondent's failure to make full payment promptly with respect to the 178 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 14, 1989.-Editor.]

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[4]Pursuant to section 1.141 of the Rules of Practice, official notice is taken of the 'artment's records which reflect that the respondent failed to renew his license on February)89, and that his license automatically terminated on that date pursuant to 7 U.S.C. § (a).

In re: MITSUGU TANITA, WAYNE WOOD, SR., and WAYNE WOOD, JR., a partnership, d/b/a MITS TANITA SALES.
PACA Docket No. D-89-513.
Decision and Order as to Mitsugu Tanita filed October 24, 1989.

Failure to pay promptly - Failure to file answer.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 15, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1987 through November 1987, respondent purchased, received and accepted, in interstate and foreign commerce, from 13 sellers, 82 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $207,735.35.

A copy of the complaint was served upon respondent, which complaint has not been answered. Wayne Wood, Sr. and Wayne Wood, Jr. filed a "Response" which did not address the substantive allegations of the complaint, but consisted solely of a denial that they were responsibly connected with the respondent partnership. Their response was not considered to be intended as an answer to the complaint.

The time for filing an answer having run, and upon the motion of the complainant for the issuances of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Mits Tanita Sales, is a partnership, whose address is 505 West Madison, Phoenix, Arizona 85004.
2. Respondent has never been licensed under the PACA, but it conducted business subject to the PACA as a dealer, as that term is defined under section 1(6) of the PACA (7 U.S.C. § 499a(6)), during the period April 1987 through November 1987, without the required PACA license.
3. As more fully set forth in paragraphs 4 and 5 of the complaint, during the period April 1987 through November 19877, respondent purchased, received and accepted in interstate and foreign commerce, from 13 sellers, 82 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $207,735.35.

Conclusions

Respondent's failure to make full payment promptly with respect to the 82 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 4, 1989.-Editor]

In re: MILO J. IVERSON, d/b/a IVERSON BROKERAGE.
PACA Docket No. D-89-522.
Decision and Order filed November 3, 1989.

Failure to pay promptly - Failure to file answer.

Allan R. Kahan, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 17, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 1987 through May 1988, respondent purchased, received, and accepted, in interstate and foreign commerce, from 32 sellers, 103 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $335,450.87.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following

Decision and Order is issued without further investigation pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Milo J. Iverson, is an individual doing business as [illegible] Brokerage, whose address is 215 Administration Building, State [illegible] Market, Forest Park, Georgia 30050.

2. Pursuant to the licensing provisions of the Act, license number [illegible] was issued to respondent on November 15, 1977. This license was renewed annually, but terminated on November 15, 1988, pursuant to section [illegible] of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period May 1987 through May 1988, respondent purchased, received and accepted in interstate and foreign commerce, from 32 sellers, [illegible] fruits and vegetables, all being perishable agricultural commodities, [illegible] make full payment promptly of the agreed purchase prices in the total amount of $335,450.87.

Conclusions

Respondent's failure to make full payment promptly with respect to the 103 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 14, 1989.-Editor]

In re: MITSUGU TANITA, WAYNE WOOD, SR., and WAYNE WOOD, JR., a partnership, d/b/a MITS TANITA SALES.
PACA Docket No. D-89-513.
Decision and Order as to Wayne Wood, Sr. filed October 24, 1989.

Failure to pay promptly - Failure to file answer.

Andrew Y. Stanton, for Complainant.
Respondents, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 15, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1987 through November 1987, respondent purchased, received and accepted, in interstate and foreign commerce, from 13 sellers, 82 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $207,735.35.

A copy of the complaint was served upon respondent, which complaint has not been answered. Wayne Wood, Sr. and Wayne Wood, Jr. filed a "Response" which did not address the substantive allegations of the complaint, but consisted solely of a denial that they were responsibly connected with the respondent partnership. Their response was not considered to be intended as an answer to the complaint.

The time for filing an answer having run, and upon the motion of the complainant for the issuances of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Mits Tanita Sales, is a partnership, whose address is 505 West Madison, Phoenix, Arizona 85004.

2. Respondent has never been licensed under the PACA, but it conducted business subject to the PACA as a dealer, as that term is defined under section 1(6) of the PACA (7 U.S.C. § 499a(6)), during the period April 1987 through November 1987, without the required PACA license.

3. As more fully set forth in paragraphs 4 and 5 of the complaint, during the period April 1987 through November 1987, respondent purchased, received and accepted in interstate and foreign commerce, from 13 sellers, 82 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $207,735.35.

Conclusions

Respondent's failure to make full payment promptly with respect to the 82 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 25, 1989.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

S and S Brokerage Co. PACA Docket No. D-88-514. 11/2/89.

Smithpro Brokerage, Inc. PACA Docket No. D-89-531. 12/1/89.

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